# THE INDIAN STATES
## IN THE
# FEDERATION OF INDIA

*(Memoir presented for the Diploma of the Institut Universitaire de Hautes Etudes Internationales, Geneva)*

BY

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WITH A FOREWORD
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# PREFACE

The memoir is devoted to the study of the position of the Indian States in the new Federal Constitution of India. Federation is still a novelty in the East and its introduction in India is being keenly watched even by the foreign politicians and political thinkers as by Indians themselves. The blending of two divergent political systems represented by British India, which is democratic in form, and the Indian States, which are monarchical, makes the study still more interesting and important.

The treatment of the subject has been divided into two parts. The first discusses the position of a state or unit in the leading federal constitutions of the world and is intended to serve as a helpful background for the proper understanding and appreciation of the second part. It is, therefore, more or less illustrative rather than exhaustive. The second part is devoted to the analysis of the position of the Indian States in the new Federation, which is being formed according to the Government of India Act, 1935, and the possible repercussions of the Federation on the internal, no less than the external, politics of the States. The financial aspect of the Federal scheme has not been discussed here. It is a problem by itself which deserves to be the subject matter of a separate treatise.

The fact that the writer is a subject of the State of Baroda, one of the foremost States in India, and his long association with practical problems of administration in the Political Department of the State, have facilitated the handling of this subject. It is, at the same time, necessary to emphasise that

the views expressed in the memoir are entirely the personal and independent views of the writer and consequently the responsibility for them is entirely his. They cannot be attributed to the State itself.

I am deeply indebted to that doyen of Indian States politicians, Sir Manubhai N. Mehta for the honour he has done me in contributing a Foreword to my humble effort in spite of overwhelming pressure of work. I am also grateful to Prof. P. B. Potter of the Institut Universitaire de Hautes Etudes Internationales, Geneva, for his kind suggestions from time to time while I was at the Institute. These suggestions have undoubtedly enhanced the value of my study.

Mr. M. N. Kulkarni, Proprietor of the Karnatak Printing Press, deserves to be congratulated for the nice printing. My thanks are due to him also.

My effort will be amply rewarded if this book stimulates a desire in the reader to study the problem of the States in its right perspective and enables the critic to appreciate the view point which I have tried to explain.

*Baroda, 26th April, 1939.* D. N. NARAVANE.

# FOREWORD.

This treatise on the position of the Indian States in the Federation of India is full of information and makes very profitable reading. Mr. Naravane has earned the gratitude of students of the Reforms Constitution for India by his very illuminating book. I congratulate Mr. Naravane for his happy knack of selecting the day and hour for the publication of this useful thesis which gained for him distinction at the hands of the University for International Studies at Geneva. The accession of His Highness Maharaja Pratapsinhrao Gaekwad to the Gadi of Baroda will always serve to indicate as a milestone in the history of this progressive state and point to the career of a very distinguished Ruler, the Maker of Modern Baroda, that has just now closed. This book serves to remind the reader that it was the wisdom and the far-sighted vision of that sagacious Ruler who advised the accession of Indian States to the Federation of India. It was as early as 1917 that His late Highness Maharaja Sayaji Rao Gaekwad of blessed memory wrote to the Government of India that a Federation of British India and the Indian States was the only satisfactory means of securing the much desired unity of India as one country. The author while discussing the prime forces that urged the Princes of India to seek this alliance has dealt upon the four principal motives that led to the Federal idea. The proposed Federation was to be a square deal. It sought, in the first place, to implement the treaty obligations of the Rulers of Indian States towards the British Monarch, whose authority was sought to be eliminated by

one section of public opinion in India. It also sought to buttress and fortify the natural aspiration of the general people in the country to achieve Dominion Status as a further stage in their political advancement. The Indian Princes had also one eye directed to the securing of economic and financial justice for their own subjects, their second eye being naturally concentrated on their own security and the placing of their ancient rights beyond the danger of erosion which they had systematically suffered in the past through novel ideas of political practice, sufferance and acquiescence. Participation in the Council of the Federal Empire and by that avenue in the comity of the Commonwealth of Nations was the goal they had placed before government in the new scheme of orientation. For all this wise statesmanship the subjects and Rulers of Indian States will always be grateful to the late Maharaja of Baroda who has just departed.

Mr. Naravane is also entitled to just praise for his having brought out this work at this very critical juncture when we find ourselves at the parting of the ways, and feel like a ship left without a rudder, adrift on the high seas. Federation, which when agreed to by the Indian Princes at the Round Table Conference was heartily acclaimed by the Marquess of Reading as the saving plank that entirely altered the situation, appears now to be wanted by none and knocks at the door of British India or of States as an unwelcome guest and an intruder. I once had to compare it with an 'Abhisarika'—a lady spurned by the politician in British India, Hindu or Muslim, and shown only the cold shoulder by the Rulers of Indian States. What has caused this revulsion of feeling?. A close study of this book will show how the finished picture now hangs and how it differs from the ideology of the people who conceived its essentials. Mr. Naravane will have gained the object of writing this thesis if its study brings back the reader's mind to the correct pose and suggests the deviation required in the angle

of approach. For it ought never to be forgotten that without Federation there is no other way of establishing a strong government at the head of the country. The Provinces in British India have already become autonomous and will go on adding to their strength and independence with every year of tasted sweets of power. The danger of fissiparous disintegration will go on swelling in intensity unless a strong government is soon enthroned at the Centre. And is there any likelihood of the government thriving as one Member of the Commonwealth of Nations unless the Indian States are accepted as partners in the Rule?. From the very inception of the idea the Muslim delegates at the Round Table Conference were inclined to look askance at the concept; the accretion of States Members to the Federal Assembly would bring in a large array of Hindu members, so that, as they apprehended, they would be swamped. The Congress politicians fear that the States Representatives would only be a replica of the government block of yes-yes-men on the front benches and would not add to their strength. Each party looks to its own advancement. Rivalries and jealousies have played a fatal part in the past history of this ill-fated country and history often repeats itself. Men have short memories and the patriotic zeal that urged the nation to seek advancement through unity has faded and found time to cool down.

Mr. Naravane's thesis would have proved more helpful if he had also dwelt upon the financial burdens implied in the Federal idea. The Princes are often scared away by an inadequate conception of their fiscal obligations under a Federal regime. There are no benefits available without corresponding burdens; only the good and the evil have to be viewed in the right perspective. At the same time Mr. Naravane deserves credit for correctly elucidating the effect of radical amendments in the Act and the position of the acceding states. Certain amendments are permitted under Schedule 2 annexed to the Act; the rest are by implication prohibited. The Act is silent as

regards the effect on the Instrument of Accession if one of the prohibited amendments finds place on the Statute Book. The term 'Secession' has acquired a peculiarly offensive stench since the passing of the Statute of Westminster as the result of the Imperial Conference of 1926 included the freedom to secede among the rights of Dominions that had attained that status. If a protected clause of the Act of 1935 is at any time in the future amended, the Instruments of Accession, in the words of the Solicitor-General, "are voided." The Secretary of State admitted that in such circumstances "the state had the right to reconsider its position, or in more technical language, it may be said that if protected provisions are amended, the States' Instrument of Accession is voidable, though not void." This clear exposition of the law ought to shed encouraging light upon Princes and hearten them against the fear of taking a leap into the dark abyss.

It is true the British Government, if they are eager to have federation and thereby to re-establish a strong Central Government at the head of the powerful autonomous provinces and thus restore centripetal proclivities, ought to show more sanctity and more solemn regard for the Treaties which they have often declared to be both inviolate and inviolable. The brusque manner in which the Princes' demand for a preservation of their Treaty Rights and extra territorial privileges has been side-tracked does not serve to restore confidence in the minds of the Ruler who is asked to rely on the Instrument of Instructions to the Crown Representative and to the Governor-General as to how the latter should implement his special responsibility under Section 12 (g) of the Act. The Princes seriously doubt if the Governor General would in future feel bold enough to act at his own individual judgment contrary to the advice of his Federal Ministers. Moreover as long as the two functions are combined in one authority the Crown Representative and the Governor General will find himself torn by

divided loyalty, when the weaker will have to go to the wall. The alternative of separating the two functions in two different persons would only revise the danger of having two kings of Brentford in one throne. It would be far worse than the proposed arrangement which may be likened to that of a man with two wives; with two voices, now coaxing and cajoling the one and now coercing and compelling the other. The Princes find no solace in this situation of divided allegiance and are anxious to have their rights well protected and, in the case of justiceable rights, armed by free access to the Federal Court.

The Rulers of Indian States want their sovereignty and internal autonomy impaired as little as possible. They should be prepared to make some sacrifice if needed in the best interest of their motherland. The Rulers of Indian States would be wise to remember the ideal set before them :—

"Daughter am I in my mother's house;
But mistress in my own."

Mr. Naravane's book will have served its purpose if it succeeds to bring back the alienated affections of the Rulers to their first love.

*24th April 1939.* MANUBHAI N. MEHTA.

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# PART ONE

# A STATE IN A FEDERAL UNION

# CHAPTER I

## WHAT IS A FEDERAL UNION?

*Introduction.*—"Politically there are thus two Indias, British India governed by the Crown according to the statutes of Parliament and enactments of the Indian legislature, and the Indian States under the suzerainty of the Crown and still for the most part under the personal rule of their Princes. Geographically India is one and indivisible made up of the pink and the yellow. The problem of statesmanship is to hold the two together". (The Indian States Committee, 1928).

The Government of India Act, 1935, claims to solve this problem of statesmanship by formulating a scheme for the union of the two Indias into the Federation of India. In other words, the Act lays down a plan to hold the pink and the yellow together, each colour still retaining its distinct identity. By putting before the nation the unique conception of an All-India Federation, the Act ushers in a new era in the development of Indian polity and opens a new chapter in the political life of the Indian State which had been kept in isolation from British India and the rest of the world. The Indian State, with its glorious historical traditions, must play an important part in the future development of India, political, economic and cultural. A study, therefore, of the political and constitutional position of the State, the duties and responsibilities

that it has to shoulder in the working of the new constitution and of the possible repercussions of this new experiment on the future of the State, is obviously essential.

*Need for a general study.*—Federalism is essentially a product of Western political philosophy and practice and it has taken root and thrived in the occidental world. Nowhere in the oriental countries has this experiment been tried so far and its introduction in India is indeed a novelty to eastern political thought. The success or otherwise, of this scheme will depend upon a sound knowledge of the theory and practice of federal governments which the Indian politician can bring to bear on the practical problems of administration. A general knowledge of the principles of federalism is as much essential to the common citizen as to the politician. The necessity of such a general study as a background for the appreciation of the position of the Indian State becomes obvious when one reflects upon the embarrassing position in which some of the Indian delegates to the Round Table Conference found themselves when they were faced with the problem of framing a federal constitution for India. " A story went round St. James' Palace in 1930 that a distinguished delegate from India had gravely proposed at a meeting of one of the sub-committees that some eminent professors of political science should be called upon to give a course of lectures on Federation. The suggestion seems to have been politely ignored and no further action seems to have been taken, on this remarkable proposal, by any responsible person. The story correctly pictures the anxiety and perplexity into which many Indian delegates were thrown by the Federal proposals, and gave expression to the feelings of many people who gathered together on a foggy London morning to hammer out a new scheme for India. The author has no hesitation in confessing that he, along with some others, who had not been through their novitiate, started his work by a voracious study of Bryce and Freeman, Sobei Mogi,

George Jellinck, Seydel and others." (SIR SHAFA'AT AHMED-KHAN, *The Indian Federation*, p. 25).

*A Federal Union defined.*—A federation is usually defined as a combination or compact between two or more states to establish a new state, everyone retaining a place and a status for itself inside the new organisation. The English historian, Freeman, says : "The name federal government may be applied to any union of component members where the degree of union between them surpasses that of mere alliance, however intimate, and where the degree of independence possessed by each member surpasses anything which can fairly come under the head of mere municipal freedom". According to the same writer "a federal commonwealth in its perfect form is one which forms a single state in its relations to other nations, but which consists of many states with regard to its internal government." (*History of Federal Government*, pp. 2-3). A more precise and a more realistic definition in the light of existing federal constitutions in the world has been given by Garner : "Where several states unite themselves together under a common sovereignty and establish a common central government for the administration of certain affairs of general concern or where a number of provinces or dependencies are by a unilateral act of their common superior transformed into largely autonomous self-governing communities, we have a federal union, or as is often said, a federal state." (*Political Science and Government*, p. 280). A federation is, therefore, a form of Government in which for the purpose of administering some important governmental functions local governments or governments of the units are recognised as independent, free from any interference at the hands of the common or the central government except in a manner laid down by the constitution, and wherein the common government is constitutionally empowered to administer the field allocated to itself without any hindrance from the component states. As a form of govern-

ment, a federal union must be distinguished from a confederation on the one hand and a unitary government on the other.

*What is a Confederation.*—"A confederation is a union or association of states formed for the purpose of promoting or achieving certain specific objects, especially the maintenance of their common external security." (GARNER, *Political Science and Government*, p. 273.) The individual states retain intact their own sovereignty and also their own governmental autonomy in so far as the latter is not expressly surrendered or delegated to the confederate organs established by the act of union. It is a union of members who agree, as equals, to act in concert touching certain matters of common interest. The decisions of the common body are more in their nature recommendatory than mandatory. If a war breaks out between the members, it is not a civil war but an international war.

*A Confederation and a Federal Union.*—A federal Union, unlike a confederation, is not a mere league of independent states associated together for the purposes of external defence, but it is a union resulting from the merger of political communities for the regulation of certain internal functions of common interest to all component members. The act by which a federation is formed is a constitution and not a mere compact as in the case of a confederation. A federal constitution is an irrevocable contract between the federating units and every such unit can enjoy its independence, restricted or unrestricted, according to the terms of the contract which can be amended in the manner prescribed by the constitution. A compact forming a confederation is a contract for the performance of certain specific functions and is capable of becoming void or voidable at the instance of one or more members when the basis of the contract materially alters. In a federal state the component parts are subject to a common sovereign and collectively they form a single united state. In a confederation the parts have no common sovereign and they do not constitute a single

political society but each is itself a sovereignty. In the federal system there is but one real state, one central government and a number of local governments. In a confederation on the contrary there are as many states as there are competent members. There is, however, a common peculiarity that both are constituted by the association of distinct independent communities; but under a confederation these communities retain their distinct positions and independence while in a federal union they are practically welded together into a single state, into one nation.

*A Unitary Government.*—The position of the local administration in a unitary state is altogether different from that of the unit in a confederation or a federal union. Where the whole power of government is conferred by the constitution upon a single central organ or organs from which the local governments derive their authority, we have a unitary state. The state is divided into divisions or districts for convenience of administration only and they can be enlarged or altered at will by the central government. The powers of the local governing bodies are small compared with those of the central government, and, most important of all, their powers are derived from the central government, they can be diminished or increased by the central government or could if it liked be taken away altogether. Notable instances of unitary governments are the governments of Italy and France. The government of India before the Act of 1935 was also a unitary government, the provinces of British India being merely administrative divisions under the complete authority of the central government. In a unitary state the local governments are merely parts of the central organisation created by the latter to act as its agents for the purpose of local administration; they are subject to its control and whatever autonomy or governmental competence may have been conceded to them exists by sufferance rather than by constitutional guarantee. The essence of unitary government is the absence of local self-government except such

as the central government itself may concede which once conceded, it may restrict or withdraw at will.

*A Unitary and A Federal State.*—As contradistinguished from a unitary state, a federal state has a system in which governmental power is divided and distributed by the national constitution or the organic act of parliament creating it, between a central government and the governments of the individual states or other territorial subdivisions of which the federation is composed. The local governments are not the creations of the central government; on the contrary in most cases the central government has been created by the constituent members through the act of federation. As the division and distribution of power are made by the constitution, the autonomy conceded to, or reserved by, the component states is guaranteed and cannot be restricted or withdrawn at the will of the central government. Within the sphere thus left to the individual states, they are supreme and are subject to little or no control by the central government. Thus in a unitary state there is one supreme power while in a federal state there is a real division of power.

*A Federal Union, a Compromise.*—A federal union is, therefore, a compromise between a confederation and a unitary state. In matters definitely delegated to the central government and in which the central government can command the obedience of the component units, the federal government approaches the unitary type while in so far as the autonomy of the units to administer their affairs, uncontrolled by the central government, is concerned an approach to a confederation is visible. It is a device to maintain an equilibrium between the centrifugal forces in a confederation and the centripetal forces in a unitary state. It is the only political system which makes it possible to have uniformity of legislation policy and administration throughout the entire country, in respect to those matters concerning which uniformity is desirable, and at the

same time, makes possible diversity where diversity is desirable by reason of the varying conditions and standards which prevail in different parts of the country. These are the essential bases of all federal constitutions in the world ; the wide diversity of forms and the varying degrees of autonomy enjoyed by the units in the different constitutions are due to the diversity in their national circumstances and historical antecedents.

# CHAPTER II

## THE DEVELOPMENT OF FEDERAL UNIONS

(1) U. S. A. (2) Switzerland. (3) Germany.

*The United States of America.*—In point of political antiquity and prestige the American Federation enjoys a position of premier importance as the pioneer of the modern practice of federalism. Although later federations have differed widely from the American type, they have invariably started from it as a model. The development of the federal form of government in the United States, however, consists of the history of efforts made by the several colonies to obtain the maximum benefits arising from the existence of a strong state with the minimum sacrifice of their internal independence.

*The Existence of Independent Colonies.*—Beginning by the end of the sixteenth century, colonisation in the American Continent had progressed considerably till by the middle of the eighteenth century there were thirteen distinct colonies, each with its own distinct history and antecedents. There were three classes of colonies :

(i) Some like Virginia were royal colonies governed by corporations located in England under grant from the Crown.

(ii) Others like Massachusetts were founded under charters from the Crown which, from the outset, virtually left them free to work out their own political salvation in their own way.

(iii) The third class included the "proprietary" colonies which were granted by the Crown to individual proprietors.

But whatever the original constitutional status all the colonies developed along parallel lines. The work of legislation was done in local assemblies which assumed the form and functions of provincial parliaments. The colonists thus gained the most valuable experience in the art of government throughout this initial period. But the nature of political institutions was essentially English. "As America became English, English institutions in the colonies became American. They adapted themselves to the new conditions and the new conveniences of political life in separate colonies—colonies struggling at first, then expanding, at last triumphing; and without losing their English character gained an American form and flavour." (WOODROW WILSON, *The State*, p. 268).

*The Consolidation of the Colonies and the Declaration of Independence.*—All the colonies, however, were completely independent of each other. There was practically no community of interest and community of sympathy between them. Each of them was imbibed with a strong feeling of local patriotism which made even an approach to a union almost impossible. "They differed in origin, in economic and physical conditions, in social structure, in religious sympathies, in political opinions. To bring together communities so diverse in origin and so divergent in outlook would have been impossible save under the pressure of military necessity. The Seven Years War against France and Spain, the war which deprived France of Canada and Luisiana, and Spain of Florida, did something. The quarrel with England with regard to commercial policy did more." (MARRIOTT, *Mechanism of the Modern State*, Part I, p. 108). The policy of Grenville and North in England had estranged the sympathies of the colonies and had gone a great way in accelerating the formation of a homogeneous people out of a

group of heterogeneous colonies. Forced by the exigencies of war to look to France for assistance, they had no alternative but to agree to the insistence of France on the Colonies declaring their independence before help could be obtained. On the fourth of July 1776 the famous declaration was made that "these united colonies are and of right ought to be free and independent states." A new nation was born into the world.

*Formation of the Federation.*—After this declaration of independence the colonies became free from the control of the mother country and the demand for a constitution became apparent. The constitution however was supplied by the Articles of the Confederation adopted in 1781. "But these Articles gave no real integration to the confederated states ; they were from the first a rope of sand which could bind no one... Under them the powers of the confederation were to be exercised by its congress... its function was to be advice, not command. It hung upon the will of the states, being permitted no effective will of its own. The Articles were in effect scarcely more than an international convention." (WOODROW WILSON, *The State*, p. 287). So long as the war lasted the confederation from sheer necessity held together but with the return of peace internal weaknesses and jealousies began to develop. The different colonies freely indulged in tariff rivalries. There was a serious internal rebellion in Massachusetts. It was, therefore, soon clear that for internal peace, external strength and common economic progress, a stronger central organisation was essential. A constitutional Convention which met in Philadelphia in 1787 under the leadership of the famous federalists, Hamilton, Madison, Franklin and Randolph, drafted a constitution. This constitution was later submitted to the Congress of the United States and also to a convention of delegates specially chosen for this purpose in each state. It was brought into effect in July 1788 and with a few amendments still forms the constitution of the United States of America.

*General Characteristics.*—The American Constitution exhibits two cardinal principles, namely, the sovereignty of the people and the equality of the States under the federal union. It also exhibits the regard of the framers for Montesquieu's theory of the separation of powers by keeping the legislature, the executive and the judiciary quite independent of each other. It "bears almost in every article the marks of its origin; at every turn it reveals the jealous fears of the constituent republics, lest any form of national government should curtail their independence and limit their powers... Yet when all is said the essential safeguard for the rights alike of the States and of the people is to be found in the constitution itself." (MARRIOT, *Mechanism of the Modern State,* part I, pp. 115-16).

*Switzerland.*—"The position of the Swiss Confederation in the general polity of Europe appears at first sight to be as anomalous as it is certainly unique. Tried by any of the ordinary political tests a product so apparently artificial would seem to have no right to exist. Yet it is safe to say that there is no European power whose future is more assured. Consisting to-day of twenty-five autonomous and sovereign States, it still seems to defy every canon known to political science; ethnology and geography, creed and language, history and policy combine to forbid the bans of political union among states and people so essentially diverse if not actually discordant. Yet in Switzerland the compact of elements which own no common 'nationality' is a factor to be reckoned with in any estimate of the forces which go to make up the European economy... Though an artificial product, and now artificially protected by European guarantee, its gradual evolution was entirely spontaneous. And its governmental system is a reflex of its political history." (MARRIOT, *Mechanism of the Modern State,* Part I, pp. 77-78).

*The Seeds of Federal Union.*—The beginnings of the Swiss federation can be traced to the formation of a league between the three forest cantons of Uri, Schwyz and Unterwalden in 1291

with the object of offering a united opposition to the Hapsburg Counts who held feudal authority in those parts. The early success of this union induced other cantons also to join the League. Strengthened by the addition of new members the league developed into a powerful body and succeeded in inflicting a series of defeats on the Hapsburgs till by the end of the fourteenth century, the league established itself as an independent confederation. The tie between the members of the confederacy, however, was of the loosest kind. There was a federal Diet which met annually, and in which each separate state was equally represented. The decisions of the Diet were not regarded as binding unless they were unanimous, thus indicating the local suspicion with which the Diet was regarded and the strong local patriotism of the states.

*Under French Domination.*—The divergent and anomalous position of the cantons and the contrasts in governmental methods they presented created a disruptive tendency which was further aggravated by religious differences arising from the Reformation. By the end of the eighteenth century, Switzerland, which had been weakened by internal disunion, fell an easy prey to the formidable armies of Napoleon. The French ignored the historical traditions of the country and provided a representative national government endowed with power to demand obligatory military service and created a central government in neglect of the local autonomy to which the people had been accustomed. The constitution was called the Constitution of the Helvetic Republic (1798), but in reality Switzerland became a dependency of France. As this constitution could not work, Napoleon summoned together delegates from various parts of Switzerland to Paris and a new constitution known as the Act of Mediation was drawn up in 1803. This Act recognised the sovereignty of the cantons and introduced the principle of representative democracy. The regeneration of the country was, however, very near. In the reorganisation that

followed the fall of Napoleon and the acceptance by the great powers in Vienna in 1815 of the independent status of Switzerland, the Constitution underwent a radical change.

*Further Development of the Constitution.*—The new constitution was essentially centrifugal in character. Especially by investing the three principal cantons with a sort of presidential authority, it created a feeling of jealousy and antagonism between the cantons. This feeling culminated in 1843 in an open rebellion of the Sonderbund or the league of the seven Roman Catholic cantons which threatened actual secession from the Confederation. Again in 1847 civil war broke out and although the differences were soon settled, the necessity of repudiating interference of foreign states in the internal affairs of the confederation was firmly and finally acknowledged. A new scheme was adopted in 1848, and although considerably amended in 1874, it still forms the basis of the present Swiss Constitution.

*General Characteristics.*—Although framed on the American model, the Swiss constitution has maintained its originality and a continuity in its historical development. It is a type by itself and provides an admirable instance of a constitution based on the principle of checks and balances, quite in keeping with the natural aptitudes of the people. While respecting cantonal sovereignty in all matters of internal concern, it sets up a central government which by its wide powers of legislation and administration serves as a real guide, friend and philosopher to the tiny republics which form the country of Switzerland. Although formally termed a 'Confederation', the Swiss Republic is the most perfect form of a federation which has raised a whole nation from narrow local prejudices to a higher national patriotism.

*Germany.*—The history of German federation is a history of two federations, one signified by the establishment of the German Empire in 1871 and the other by that of the establishment of the Republic after the revolution that followed the

World War. Although these two federations differ widely in their composition because of the existence of the Emperor in the former and the predominance of the popular will in the latter, there is an essential unity of ideology between the two constitutions which fully reflect the national characteristics of the German people and their historical traditions.

*Early history.*—After the dissolution of the Holy Roman Empire, and until the latter half of the nineteenth century, Germany consisted of a number of independent states and Duchies, the inhabitants of which spoke the same language and the hereditary rulers of which conferred together in a Diet to which they appointed their deputies. It was in the nineteenth century that the conception of national unity began to grow up in Germany. One of the earliest acts of Napoleon in his contest with Austria and Prussia was to isolate these two states by creating a buffer state, out of smaller German states, called the Confederacy of the Rhine. In 1813, however, Germany rose, the confederacy of the Rhine went to pieces and all Napoleon's plans were undone. But Napoleon had done Germany the inestimable service of making her patriotic. In 1915 was formed the German Confederation which held the states more firmly than they had ever been before. However the influence of Austria was preponderant in this confederation. "The arrangement was little enough like a national union; the large states had preponderant representation in the Diet, Austria dominating all; and each state, whether great or small, was suffered to go its own way, make its own alliances and fight its own wars, if only it refrained from injuring any one of the Confederates or the interests of the Confederation." (WILSON, *The State,* pp. 444-45).

*Economic and Political Consolidation of Germany.*—A real national Germany could not be formed till Austria was ousted from German politics. During all these years, Prussia was gaining in influence and in 1833 she led in the formation of a

customs union or Zollverein between herself and all the states of the Confederation except Austria. The establishment of the Zollverein on a free trade basis and its successful working paved the way for the subsequent political arrangements which were also to be free from Austrian interference. From an economic union Germany was slowly and steadily drifting towards the formation of a national union with Prussia leading in this process. A strong hand and a diplomatic brain were needed and they were made available by the rise of Bismarck on the German political horizon. In 1862, Bismarck became the Minister President of Prussia and within less than three years of his appointment, Prussia declared war against Austria. By finally inflicting a crushing defeat in 1866, Bismarck perpetually annihilated Austrian influence in German political life. The success over Austria was followed by the formation of the North German Confederation, in 1867, under the leadership of Prussia and with Bismarck as the first Chancellor of the Confederation. The signal victory of Germany in the Franco-Prussian war of 1871 completed Bismarck's programme for a united Germany under the hegemony of Prussia. The King of Prussia was declared the first German Emperor. "Bismarck got precisely what he did want, and that was a united Germany under the perpetual leadership of Prussia, on the basis of state rights, and the acknowledgement of the divine right of princes in opposition to the popular claims that elsewhere in Europe had created constitutional and responsible government".[1] (*Select Constitutions of the World*, p. 173).

*General Characteristics.*—The constitution of the German Empire rested on a federal basis but it materially differed from the federations in America and Switzerland in that it maintained hereditary kingships and the dominance of one state over others. The three fundamental principles of this consti-

[1] The Irish Parliament

tution were first, the authority of the individual states; second, control of foreign relations by the Confederation and third, Prussian control of the military in peace and war. To the student of Indian politics the constitution of Imperial Germany presents more analogies than does any other federal constition in the world. The problems that faced her were: (1) the existence of one state, Prussia like British India, predominant alike in military and financial power, in area and in population and (2) the existence of a large number of minor states each rooted in historical traditions and intensely jealous of its sovereignty. The method by which the confederation was called into being is also of importance. Prussia conducted independent negotiations with the twenty-one states which were to be federated with her, and concluded separate treaties. The validity of the constitution depended upon these treaties by which the different rulers surrendered a common measure of their powers. The Constituent Assembly merely ratified the constitution created by the treaties. The alliance was on the basis of the guarantee to the states of their internal sovereignty coupled with the surrender of definite powers to a central government constituted out of the states.

*Formation of the German Republic.*—The German Empire formed in 1871 lasted till the World War of 1914-18. During this period Germany made tremendous progress in all sides of national activity and came forward as one of the foremost of world powers. But her constitution broke down under the pressure of circumstances brought about by the reverses in the war. The revolution in Germany in 1918 followed by the insistence of President Wilson on the establishment of a popular government as a condition precedent for negotiations of peace resulted in the abdication of Kaiser and along with him the dethronement or abdication of all hereditary princes in Germany. The National Constituent Assembly elected on the basis of direct, universal, equal and secret suffrage met at Weimar in

February 1919. In the actual task of framing a permanent constitution there were two distinct parties, those who wanted to wipe off the states and establish complete centralization and those who wished to retain the separate character of the states with the only stipulation of curbing the power of Prussia. After protracted discussion they arrived at a compromise between the two extremist views and a real federal constitution was drawn up which without being subjected to a referendum was put in force by executive order on August 11, 1919. (NEWTON, *Federal and Unified Constitutions : Introduction,* p. 33).

*General Characteristics of the Republican Constitution.*— The Constitution of Republican Germany[1] may be summarized thus : It destroyed monarchical governments and established republican institutions based on the will of the people. It is federal in character and has done away with the supremacy of one state over others. But in other respects it is more centralized than the constitution of the Empire. There is no constitutional guarantee of the autonomy of the units such as is usually considered to be an essential characteristic of a federal union. From the status of a federal union of a highly confederate character, it has passed very nearly to the opposite extreme, that of a centralized unitary state. It possesses the semblance of a federal union without the true federal system of organisation.

[1] References in later pages to the constitution of Republican Germany relate to the provisions of the constitution framed at Weimar in 1919. Its subsequent amendments and its practical abrogation under the Hitlerian dictatorship are matters with which the present study is not concerned.

# CHAPTER III

## THE DEVELOPMENT OF FEDERAL UNIONS

*(Continued)*

(4) Canada. (5) Australia. (6) India.

*Canada.*—Canada was originally a French possession but it was conquered by England during the Seven Years' War and was formally transferred to the British control by the Peace of Paris in 1763. In 1774, the Imperial Parliament passed the Quebec Act which created a Legislative Council, members of which were appointed by the Crown with powers to make ordinances but not to impose taxation. This Act served a double purpose : it secured the loyalty of French Canada throughout the conflict with the American colonies when the French population actively co-operated in repelling American attacks on Canada and secondly it marked an important stage in the evolution of colonial government.

*Further Development of Responsible Government.*—The recognition of American independence in 1783 and the gradual influx of emigrants from America and also the mother country opened a new epoch in the history of Canada. These emigrants brought a new element in the social and political life of the colony, the direct result of which was the Constitutional Act

of 1791 which marks the second stage in the constitutional development of Canada. The Act divided the territory of Quebec into two provinces, under the titles of Upper and Lower Canada, the British element predominating in the former and the French element in the latter. In each province there was to be a governor, assisted by an executive council and a bicameral legislature : a council of nominees and an elected house of representatives. The legislature had, however, no real control over the executive. There was representation without responsible government. This inherent defect of the Act of 1791, coupled with fiscal and ecclesiastical differences, led to the unsuccessful working of the measure.

*Canada under Lord Durham.*—This unsatisfactory state of affairs continued for over forty years. There was a persistent demand in the provinces for control over the executive, control of the purse, an elected legislative council and the independence of the judiciary. Finally the situation culminated in concerted insurrections in both provinces and although the insurrections were put down, the Act of 1791 had to be suspended and Lord Durham was sent out as Governor General in 1838. Lord Durham "spoilt his mission by well meant but arbitrary conduct which was misunderstood at home, and he was recalled ; but his report upon the condition of Canada and the measures necessary for her pacification may justly be called the fountain-head of all that England has since done for the betterment of government in her colonies". (WILSON, *The State*, p. 249). The Union Act of 1840 was based on Lord Durham's recommendations. It provided for the reunion of the two provinces and for a parliament of two chambers : one a Legislative Council with not fewer than twenty persons nominated by the Crown for life and second, an elected House of Assembly in which each province was to be equally represented. This Act was followed by the introduction of responsible government in other colonies as well.

*Establishment of the Federal Union.*—Meanwhile Canada entered upon a period of rapid economic and social development. On the one hand, in spite of the union, differences in race, religion and tradition kept apart the people in the two provinces. On the other hand, among the Maritime States there was a strong movement for a closer union. In 1861 Nova Scotia, Prince Edward Island and New Brunswick agreed to hold a convention to which the Canadian government also sent their delegates. The Convention evolved a scheme for a federal form of government and it was finally adopted by the British Parliament as the British North America Act of 1867.

*General Characteristics.*—The British North America Act or the Canadian constitution provided not only a federal constitution for the Dominion of Canada, but made a constitutional provision for the government of the provinces which entered the federation. Under this constitution, specific legislative powers were given to the constituent states and the residuary powers left to the Federal Parliament, a feature in contrast with the provisions of the American constitution. "The Act of 1867 marked a distinct departure in the colonial policy of Britain and showed that the lesson of the American Revolution had not been lost in the counsels of the British Cabinet. It also indicated that even while owing common allegiance to their British Sovereign, the colonies could evolve a system of government which would satisfy their aspirations. It was this lesson of the Canadian Federation which placed before the other parts of the British Empire an example which was soon followed with vantage". (SHARMA, *Federal Polity*, p. 89).

*Australia.*—The Commonwealth of Australia is one of the youngest of modern federations, established by the Commonwealth of Australia Act of 1900. For a hundred and thirty years, since the discovery of New South Wales by Cook in 1770, the Australian colonies developed along their own lines undisturbed by any external or traditional influences. Originally

intended to be mere penal settlements, it was later on discovered that these colonies afforded incomparable facilities for sheep-grazing and, therefore, in 1821, the colonies were opened for free immigration. The first step, however, in the establishment of representative government was taken in 1842 when New South Wales was given a Legislative Council consisting of twleve nominated and twenty-four elected members. This was followed in 1850 by an Act of Parliament which gave to the several colonies general powers to settle for themselves the exact form of their constitution. Under this Act, New South Wales, Victoria, South Australia and Tasmania attained the dignity of responsible government in 1855. Queensland attained this status in 1859, and the last colony to acquire the status was Western Australia in 1890. The governments of these colonies were substantially identical in form, consisting of a Governor appointed by the Crown and advised by a council, composed in part by the Ministers of the day and of a dual legislative body to which Ministers were responsible.

*Development of the Federal Union.*—During the latter half of the nineteenth century each of these Australian colonies continued to develop its own policy in regard to political and economic matters. There being no danger of invasion, one of the strongest motives towards the formation of a federation was lacking. The absence of a common fiscal policy, however, caused grave inconvenience and popular opinion began to tend towards a closer union of the colonies. In 1889, the problem of defence was brought into the lime-light by the report of Major General Edwards who had been asked to report on the military position of the colonies. But the greatest impetus to this desire for union was given by the occupation of New Guinea by France and the rumoured attempt of Germany to annex the New Hebrides.

*The Federal Council of Australasia Act.*—The crude beginnings of Australian federation had already become visible in the

Federal Council of Australasia Act passed by the British Parliament in 1885. This Act created a council with limited powers to deal with certain common matters. There was no executive or judicial power created by the Act. Even the membership of the Council was optional.

*The Formation of the Federation.*—As years passed, the governments of the colonies began more and more to realise the necessity of some form of a federal union. Conferences were held in 1890 and 1891, in which resolutions were passed laying down the basis on which federation should take place; but it was not till 1897 that a convention could assemble at Adelaide to frame a federal constitution. The draft of a constitution prepared by the Convention was submitted to the Legislatures of the Colonies and the suggested amendments were considered by the convention which met at Sydney. The final proposals as adopted by the Convention were submitted to the Imperial Parliament which adopted them practically unaltered. The federation of the Australian colonies was established by the Commonwealth of Australia Act of 1900.

*The General Characteristics.*—The Australian Federation differs from the Canadian in the fact that the motive for the formation of a union differed in the two cases. The Australian constitution follows the American model in its general arrangement so that unlike the Canadian constitution, it leaves the residuary powers to the constituent states. In the Commonwealth Parliament the federal principle is recognised in the equal representation of the states in the Senate, the representation in the lower chamber being on the basis of population. The Constitution, further, leaves in tact certain direct contacts between the states and the British Government which the Canadian provinces have lost altogether.

*India :—The Transfer of the Government of India to the Crown.*—The year 1857 marks an important turning point in the political history of India and the history of the development

of the federal idea in India, which means the development of representative institutions, can be said to begin from that year. This year witnessed the last struggle of the remnants of the old dynasties to oppose the mighty British power which had become supreme in India. With the suppression of the 'Sepoy Mutiny', termed by Indian historians 'the first war of independence', the career of the East India Company as a political power came to an end. By the Parliament Act of 1858 the Government of India passed from the Company to the Crown, vested in the Crown all the territories and powers of the Company and declared that India be henceforth governed by the Crown directly by its own servants. The Crown thus became *de jure* as well as *de facto* Sovereign of India and the practical arbiter of India's political destiny.

*The India Councils Act of 1861.*—The first important step towards the introduction of representative institutions was taken by the India Councils Act of 1861. The Act provided for the establishment of the Governor General's Legislative Council which was to have not more than twelve and not less than six members, half of whom were to be non-official. Provincial councils consisting partly of non-official members were also established.

*The Indian National Congress.*—For some years after the transfer of government from the Company to the Crown, Government was mainly occupied with the consolidation of its powers and the maintenance of law and order. As a step towards this consolidation, they completely disarmed the whole population. By the eighties of the last century the political depression consequent upon the suppression of the revolution of 1857 was over and the Indian public began to look around and consider their status. The establishment of the Indian National Congress in 1885 was the symbol of the growing desire of Indians to participate in the administration of the country. As armed opposition was out of question, constitutional agitation by way

of petitions and protests, the only weapons in the hands of the weak and the unarmed, was carried on by the Congress. As a result of this agitation further reforms were introduced in the composition of the legislative bodies by the Indian Councils Act of 1892.

*The Indian Councils Act of 1892.*—Under this Act of 1892, the members of the legislative councils were given the right to put questions and to discuss the budget but voting on the budget was not allowed. Provision was also made for the introduction of an elected element in the legislature by the process of indirect election. The Governor General's Legislative Council was enlarged by the addition of sixteen members. How far this Act introduced an element of responsibility in the legislature has thus been described by Sir Chimanlal Setalvad, the oldest liberal politician in India : "When I first entered the Bombay Legislature (then called the Bombay Legislative Council) in the year 1893, that body was no more than a dignified debating society. The elected element formed only a small proportion of the total number, the rest being nominated by the government. Barring actual legislation the members of the Council had no control over the administration. They had only the right to put interpellations at the meetings of the Council and to discuss the annual budget but no power to move any alterations therein. There was, of course, under the circumstances no element of responsibility in the Legislature." (JOSHI, *The New Constitution of India*, Foreword, p. vi).

*The Morley-Minto Reforms of 1909.*—The dawn of the present century witnessed a tremendous national awakening in India, the province of Bengal being in the forefront. The administration of Lord Curzon and his partition of Bengal, apparently for administrative convenience, were interpreted by the people as an effort to cripple the nationalist renaissance in Bengal. A wide agitation in the country was set on foot to get the partition annulled, accompanied by a movement for the

boycott of British goods as a retaliatory measure. The demand for political advance was greatly intensified as a result of which changes under the Indian Council Act, otherwise known as the Morley-Minto reforms, were introduced in 1909. The Act provided for enlarged legislative councils in the provinces as well as at the centre. Additional powers were given to the members in the matter of putting supplementary questions, moving resolutions and discussing the budget. The method of election, however, continued to be indirect. The worst element it introduced, was the establishment of separate electorates for the Mohamedans, thus sowing the seeds of a perpetual struggle between the two principal communities in India. Though the Morley-Minto reforms are now looked upon as containing the 'seeds of Parliamentary government' Lord Morley most emphatically denied having had any intention of introducing Parliamentary government in India. Lord Morley stated, "If it can be said that this chapter of Reforms had led directly or indirectly to the establishment of Parliamentary system in India, I for one would have nothing at all to do with it". (*Montague Chelmsford Report,* p. 79). The reforms were clearly unlikely to satisfy the extremist demands for self-government and in fact, went but a small way to conciliate the moderates. The spectacle of the official bloc in the legislatures voting as a solid unit whenever any governmental measure was under considertaion excited resentment.

*The War and the Announcement of British Policy.*—Although the reforms were unsatisfactory, the visit of King George V in 1911, his coronation in Delhi and the annulment of the partition of Bengal helped to assuage public feelings and anti-government agitation subsided to a very large extent till the outbreak of the Great War. During the War, public opinion in India demanded an announcement of the policy of British rule in India. The Indian Home Rule League was started under the leadership of Lokamanya Tilak and Mrs. Besant.

The demand was made all the more because Britain declared that she was fighting for the freedom of small nations and suppressed nationalities. The political reactions of the war were momentous. Indians had whole-heartedly espoused the cause of the British and Indian soldiers fought shoulder to shoulder with the British soldiers on the European front. The action of India in the war created conditions incompatible with the maintenance of the *status quo*. The military position in Europe was creating anxiety in the minds of the British cabinet. To placate Indian opinion, an announcement was made on August 20th, 1917 that " The policy of His Majesty's Government was that the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India as an integral part of the British Empire ".

*The Montague-Chelmsford Reforms.*—The announcement of 1917 was followed by the Montague-Chelmsford reforms embodied in the Government of India Act, 1919. The most important innovation made by this Act was the introduction of the system of government called ' Dyarchy '. In the provinces the government dealt with two sections of functions called ' transferred ' and ' reserved ' respectively. The transferred departments like education, agriculture, excise, and local self-government were to be administered by ministers who must be elected members of the legislative council and who would be removable by a vote of that council. The reserved departments like police, justice and finance were administered by members of the Governor's Executive Council, appointed by His Majesty's government and who would be independent of the vote of the legislature. There was no dyarchy introduced in the central government where the whole of the Executive Council was appointed by His Majesty's government and was beyond the vote

of the Central Legislature. The Central Legislature was bicameral with a majority of elected members.

*The Working of the Government of India Act, 1919.*—Contemporary events, however, proved inauspicious for the inauguration of the reform scheme. The Rowlatt Act giving powers to the police to arrest persons without warrants, the reign of terror established by Sir Michael Odwyer in the Punjab, the ruthless massacre of hundreds of unarmed men, women and children in the Jallianwalla garden at Amritsar by General Dyer, the white-washing of the whole affair by the Government of India and the events after the war which threatened the dismemberment of Turkey, all combined to rouse suspicion in the minds of the Indian people concerning the bona fides of the British government. The Indian National Congress led by Mahatma Gandhi decided to boycott the legislatures and follow this boycott with a campaign of non-violent non-co-operation with the government, a weapon till then unknown in political agitation. The field, thus left by the only strong party in India, was occupied by the Liberals and small communal groups which had hardly any following in the country. How even the Liberals were disillusioned by the actual working of the Act of 1919 has been described by Rao Bahadur R. R. Kale thus : " My experience of the reformed councils extending over a period of a dozen years, has shaken my faith in the bona fides of government who while professing to lead the country on the right path of attaining the goal of Swaraj has let loose forces of communalism and self-interest retarding the speed of sound and broad principles ". (Address as President, Reception Committee of the Sixteenth National Liberal Federation of India—1934).

*Events leading to the Round Table Conference.*—In 1924, an important section of Congressmen, called Swarajists, under the leadership of Mr. C. R. Das and Pandit Motilal Nehru, contested the elections with the avowed intention of offering

a uniform, consistent, continuous obstruction to government thus making government through the councils impossible. They succeeded in paralysing the dyarchical form of government in the Central Provinces completely and in Bengal to a considerable extent. In the Legislative Assembly, Pandit Motilal successfully moved a resolution demanding that a round table conference should be convened for framing a scheme of self-government. The government did not accept the demand and showed that they did not believe in the merits of a round table conference then as they came to in 1930 : "One week of a conference produces more good than six months of diplomatic correspondence. Let us get down to facts face to face ; let us sit round the table ; let each of us state our claims, state our hopes, state our fears, state our expectations ; let each of us be candid one to another and face to face there is an enormously better chance of an understanding and an agreement than under any other circumstances". (The Prime Minister at the *First Round Table Conference-Proceedings*, p. 505). A Royal commission under the chairmanship of Sir John Simon was then appointed in 1927 to report about constitutional changes. The Commission was composed of members of Parliament only and Indians were altogether excluded. There was a strong and unanimous protest against the appointment of this 'All-white' Commission. The very idea of a wholly British commission settling the destinies of India was repugnant to the Indian nationalist. As remarked by Sir J. A. R. Marriott, "Could any situation be more paradoxical almost, were it not so grave, appropriate to Gilbertian comedy? A Western people, to whom India is little more than a name, is to be responsible for framing or approving a constitution for 320 millions of Asiatics, living under conditions which most Englishmen can only vaguely guess—Asiatics, who have inherited traditions wholly alien from our own, worshippers at shrines we may not enter, trained in a philosophy which few of us can even begin to comprehend, but on the other hand

almost entirely untrained in these arts of self-government which are bone of our bone and flesh of our flesh". (*The English in India,* p. 2). The Royal Commission was boycotted by all political parties in India and although they persisted in their labours, the President was convinced that any final decision about the future constitution of India must be taken in consultation with leaders of Indian thought at a round table conference. The British Cabinet accepted the suggestion and before the Commission published their report, the Viceroy announced the decision to convene a round table conference of delegates from British India, the Indian States and the British Parliament. The Commissioners submitted a voluminous report but it attracted little attention and was almost still-born.

*Personnel of the Round Table Conference.*—The Indian National Congress boycotted the Round Table Conference as the British Government refused to give an undertaking that the Conference would meet to draw up a scheme of Dominion Status for India. This withdrawal of the Congress from the Conference left the field open for the Government to nominate delegates who were either communal leaders or political leaders like the Liberal politicians with practically no followers in the country. It also gave an opportunity to the Government to create further factions by 'leaderising' persons who were practically never heard of in Indian politics. The delegation on behalf of the Indian States was, on the other hand, composed of illustrious rulers like the Maharajas of Baroda, Bikaner etc., aided by eminent politicians and administrators like Sir Akbar Hydari, Sir V. T. Krishnamachari, Sir Manubhai Mehta and others. It was, therefore, no wonder that while British Indian delegates presented a scene of disunion and petty rivalry, the States Delegation was a united team and if the Princes have at all succeeded in getting the better of a bad bargain, it was due to their superior experience of practical political life and solidarity. The British delegation was composed of members

of Parliament representing the three leading political parties in England.

*The Federal Scheme and the Government of India Act, 1935.*—To the great surprise of the British as well as the British Indian delegates the Princes declared at the first Round Table Conference their willingness to join a federal scheme for the whole of India. The suggestion was readily accepted by all the delegates and the further proceedings of the three Round Table Conferences and the Joint Select Committee of Parliament proceeded on the basis of the establishment of the federal form of government. The proposals of the Joint Select Committee were embodied in the Government of India Act, 1935. The Act lays down three important principles, namely : (1) All-India Federation, (2) Provincial autonomy and (3) Responsibility with Safeguards.

*The General Characteristics.*—The Act of 1935 has not met with the complete approval of any section of the Indian public opinion. While the portion of the Act pertaining to provincial autonomy has already been put into operation, the federal part is most severely criticised by all the political parties in India. The general characteristics of the Act have been admirably summed up by Sir Shafa'at Ahmedkhan thus : " The new constitution is the result of a compromise and it has all the virtues and all the vices of a compromise. It is not, and could not be, an ideal solution of problems which have the closest bearing on the social, religious and political traditions of various creeds and interests. It represents experience, is chary of ideals, is severely practical and is avowedly a political hybrid. It lacks architectural unity and though massive in its structure, there is no simple and yet colossal design like that which forms the strength of the Australian Constitution and the Constitution of the United States of America. Federation forms, it is true, the connecting link but the threads by which it is held together are light as gossamer. The central conception is confused with

a multitude of subordinate authorities until it is gradually transformed into unitarism and centralization of the old type. Like a pyramid upon the top of which the political architect has placed a gilded statue, up grows the magnificent edifice, assuring autonomy to the Provinces, but it narrows to a point wherein the distinction between the prereformed and postreformed provinces virtually disappears. The sustaining pillars of the new Constitution are an efficient and zealous bureaucracy, imbued with traditions of social service and integrity, a virile patriotic and experienced middle class, nurtured on the parliamentary system and traditions ; minorities and special interests who have benefited by the concessions it offers them in the Indian Legislatures; Indian States who will now be able to pull their full weight in the legislation and administration of India ; and finally the large bulk of law-abiding, stable and influential elements of the entire Indian population, who though disappointed with the limited power which the new Act confers on Indians in the Centre, are prepared to work the new Act for what it is worth and serve their mother-land by developing the enormous resources of India for her economic and social uplift". (*The Indian Federation*, p. 19).

# CHAPTER IV

## THE FORMATION OF A FEDERAL UNION

*How a Federal Union is formed.*—The history of the development of the federal form of government in different countries reveals the existence of certain general experiences which underlie the foundation of all federal constitutions. Secondly we can also notice that the formation of the federal government in countries outside the British Empire has followed a process which is different from that by which federations within the Empire were established. In general, a federal union is created in either of the two ways. In the first case, which is the usual procedure, the federal state is formed by the voluntary coalescing of a number of sovereign and independent states for the discharge of certain functions of national importance while retaining to themselves complete control of other matters. Instances of federations formed by this process are those of the United States of America, Switzerland and Germany. In the second case, the federal system is established by a process of decomposition or decentralization or where a unitary state has been 'federalised' by a unilateral constitutional act by which its provinces are erected into autonomous states and the competence and powers of the former divided with the latter. In such a case, the establishment of the federal system is not the result of the concurrent action of the component mem-

bers but is due to the initiative and action of the central government of the unitary state itself or of a competent body superior to it. An example of this type is the formation of a federal republic in 1889 out of the provinces of the Empire of Brazil. Establishment of federations in Canada in 1867 and in Australia in 1900 followed generally this second process. Federations in these cases were constructed not out of already existing independent states but out of a group of colonial dependencies and although, in these cases, they were the results of the spontaneous actions of the colonies themselves to a large extent, legally they were the grant of the Imperial Parliament. Briefly stated; federations are formed by one of two opposite processes, integration and disintegration; the United States, Switzerland and Germany have generally followed the former while Canada, Australia and India generally the latter.

*Formation of the Indian Federation.*—The process by which the Federation of India is being formed is different from the process in other countries. In India, it is a combination of integration and disintegration which is due to the distinction in the political status of the units. While the Indian states have been sovereign and autonomous, British India forms a unitary state under the direct control of the British Parliament. So far as the provinces in British India are concerned, the Government of India Act, 1935, seeks to raise them to the status of autonomous provinces, by the devolution of powers and by the creation of new provinces like those of Sind, Orissa and the North West Frontier, to enable them to fit in the framework of a federal constitution. This process at work in British India is clearly one of disintegration. But looking at the formation of the Federation as between British India and the Indian States as units politically independent of each other, there is the process of integration. Secondly there is a fundamental distinction between the formations of the federations in Canada, Australia and India. While in Canada and Aus-

tralia, the federal constitution was mainly the outgrowth of the spontaneous actions of the units and was simply formally approved by the British Parliament, the Indian constitution is the original product of the British Parliament itself and is being imposed upon the country almost entirely against the wishes of the units.

*Essential Conditions.*—The formation of a federal union presupposes, according to Dicey, two essential conditions. "There must exist in the first place, a body of countries such as the cantons of Switzerland, the colonies of America or the provinces of Canada, so closely connected by locality, by history, by race or the like as to be capable of bearing in the eyes of their inhabitants an impress of common nationality". The second condition which is absolutely essential is the existence of a peculiar sentiment among the inhabitants who "must desire union but must not desire unity". (*The Law of the Constitution*, p. 137). Federalism assumes the existence of local patriotism and "the strongest federal unions are those in which the local patriotism finds a comfortable place within the embrace of the larger national patriotism". (WHYTE, *India—a Federation?* p. 13).

*Motives underlying the Growth of Federations.*—The motives that induce the formation of federal unions are generally the problem of defence, foreign affairs and economic advantages. But the history of federal unions shows that the strong force has usually been the danger of foreign aggression or what can be termed as international necessity rather than internal needs. Switzerland, for example, is a typical instance in which there are men speaking different languages, having divergent religions and all other factors which must normally tend towards disruption, holding together through the fear of foreign domination. In the case of Australia, on the other hand, there was less danger of foreign aggression; the principal motive that induced the formation of the federal union was the realisation

of the tremendous economic advantages which a vast united country offers. In India, the federal constitution is the result of the efforts of the British Parliament to meet halfways the growing political agitation in British India for complete independence on one hand and the growing demand of the Indian States for participation in the fiscal policy of the country on the other. It is, therefore, the outcome neither of the desire for self-protection against foreign agression nor for the economic advantages of a larger union.

*The Principal Elements of Federal Constitutions.*—Whatever the method by which a federal union may be formed, it has essentially three most important elements. Firstly there must be a common organic act or constitution which defines the precise relations between the federation and the component units. This constitution must be paramount to the constitutions of the units, otherwise the maintenance of the federal form will be impossible. In order to ensure the proper understanding or interpretation of the constitution, which must obviously be supreme over any other document, the constitution of a federal state should be generally written. As said by President Wilson, "All modern states have written constitutions; but a written constitution is not an essential characteristic of federalism, it is only a feature of high convenience. Such delicate co-ordinate rights and functions as are characteristic of federalism must be carefully defined; each set of authorities must have its definite commission". (*The State*, p. 545). As the foundations of a federal state rest, according to Dicey, on a 'complicated contract', the arrangement which it establishes cannot be left to mere understanding or convention as it is possible or practicable in a unitary State. The wording of the document must be clear and unambiguous. The second element of federalism is the rigidity of the constitution. The federal form being the result of a conscious contract between the component states, it is highly essential that it should not be

capable of being easily amended. Under the general principles of the law of contract the basis or the terms of a bilateral or multilateral contract cannot be altered without the agreement of the party or parties to the original contract. Although such rigidity is not practicable in the actual working of the constitution, the process of amendment has to be somewhat different from the ordinary process of legislation by the federal government or the governments of the units. For the security of the units themselves, an element of rigidity is necessary in any federal constitution. Finally it is most necessary that there should be a common tribunal empowered to interpret the federal constitution, to judge the limits of the respective spheres of the central and the local governments and to hold in restraint the tendencies of each to encroach upon the domain of the other. The final decision of all controversial questions between the component states *inter se* or constitutional questions between the states and the central government must rest with this tribunal. It must also have the competence to set aside the provision of any law or constitution of a constituent state which is inconsistent with the constitution of the federation. The maintenance of the federal system depends to a large extent upon the existence of a body which can act as an arbitrator or umpire in disputed matters.

*The Distribution of Powers in a Federal Union.*—Apart from the fundamental elements mentioned above, which every federal union must contain, it is absolutely necessary that the constitution must provide for a precise distribution of powers between the several organs of the federal government, namely the legislature, the executive and the judiciary. Every organ of government has a distinct function to perform and a good constitution must so distribute these functions that no one organ encroaches upon the legitimate domain of another. The actual distribution of powers between the separate organs may differ in different countries but all federal constitutions generally

recognise the importance of Montesquieu's theory of the separation of powers. But of greater importance to the units of a federation is the distribution of powers between the federal government and themselves. This distribution or division of powers is often dictated by the special necessities of each country. But the general principle on which this division rests is that those affairs which are of common interest to the federation as a whole and which require uniformity of regulation are placed under the control of the central government while all matters not of common concern are left to the domain of the local governments. There is, in short, one government for national affairs and a number of local governments for local affairs. Although the line of demarcation is drawn differently in different countries, in all federal unions in general, such affairs as international intercourse and foreign relations, war and peace, regulation of interstate and foreign commerce, patents and copyrights, currency, posts and telegraphs and such other matters are placed within the control of the central government. Each government is assigned definite sources of revenue to enable it to discharge its functions. In international relations the federal state stands as one nation and the component members have no *locus standi*, although the cantons in Switzerland possess such a right to a limited extent. In some of the more recent constitutions, there has been visible a tendency to enlarge the scope of subjects under the control of the central government. The constitutions of Germany and Canada stipulate that civil, criminal and commercial law, the law of marriage and divorce etc. are national subjects while in the United States these are within the province of the States.

*Method of Division of Powers.*—The distribution of functions and subjects between the central and local governments in a federal union follows varying lines in different countries in matters of detail. Generally these matters are specifically stated by an elaborate division of functions. However, there

must always remain certain subjects which were not, or could not be, thought of by the framers of the constitution. Such functions which do not find a place within the stipulated schedule are called residual powers. In most federal constitutions the powers entrusted to the central government are specifically enumerated and all the remaining powers are left to the local governments except those which may be specifically prohibited to them. In such a case the central government is an authority of delegated powers while the local governments are the repositories of residuary powers; in other words the competence of the central government is positively determined by the constitution while that of the local governments is negatively determined. In cases of conflict of jurisdiction the presumption of law is against the existence of any power claimed by the central government and in favour of those claimed by local governments. The Canadian constitution is, however, an exception. Section 91 of the British North America Act enumerates those subjects upon which the Dominion Parliament may legislate but it may legislate on other subjects which are not exclusively conferred on the provinces. In Canada, therefore, while local governments have specifically defined powers, the residue rests with the Central or Dominion government.

*Concurrent Jurisdiction and Normative Laws.*—The division of powers into two distinct parts, leaving certain defined powers either to the federal government or to the states and the residuary powers to the other, creates difficulties of interpretation as the powers are often likely to overlap. Secondly the peculiarities of each unit may necessitate a deviation from the practice approved by the federal government in its application. An attempt has been made to solve this difficulty in some constitutions by the recognition of certain fields of legislation as concurrent. The constitution, in such cases, provides that in certain matters the central as well as the local government has the power to pass legislation. However it is also

generally provided that, in cases of conflict, the federal law shall prevail. This device leaves a fair margin to the individual state to frame its laws to suit its special requirements in cases where the federal government has not taken the initiative or has not gone far enough to meet the necessities of the particular state. Such a provision for concurrent jurisdiction is found in the constitutions of Republican Germany, Australia and India. In certain constitutions, especially in the constitution of the German Republic, the Federal government retains the power of framing normative laws for the guidance of the legislatures of the states even in some matters within the exclusive jurisdiction of these states.

*The Division of Powers in the Indian Federation.*—The method of division of powers in the Indian Federation is altogether different from all the other federal constitutions. The scheme of distribution is twofold. There is one scheme as regards the Federation and the British Indian Provinces and a quite different scheme as regards the Federation and the States. The Government of India Act, 1935, divides the powers of government in three lists which represent the allocation, by enumeration, of the functions of legislation, including taxation, between the Federation and the Provinces. The Federal list consists of fifty-nine subjects, the Provincial list of fifty-four subjects, and the concurrent list of thirty-six subjects. Thus the whole of the legislative activity has been tabulated. The enumeration of subjects is so elaborate, careful and exhaustive that the residue appears to be almost negligible. Even then provision has been made for the residual power of legislation which is to be assigned by the Governor-General acting in his discretion, to the Federation or the Provinces as he may think proper. In the concurrent field of legislation, while normally a federal law will prevail over a provincial law, the Provincial legislatures have been given the power to legislate, with the assent of the Governor-General, in such a manner as to over-

ride a prior Federal law on the same subject. As regards the Federation and the States there is only one list, the Federal Legislative list. But even in this list, Federal legislation is applicable to the States in respect of those items only which are accepted by the States as Federal by their respective Instruments of Accession with all the limitations and reservations contained therein. There is no other list and the whole of the residuary power is reserved to the States.

*Relationship between the State and the Federal Government.*—The discussion of the general principles which underlie the formation of a federal union and the division of powers between the central government and the governments of the units or states leads to an examination of the position of a state within the framework of a federal form of government. In other words, we shall now proceed to examine how far, in the constitutions of the several federal unions, the states or the units can influence the working of the federal government in its principal branches, namely legislation, administration and judicial control including the question of the amendment of the federal constitution. We also examine how far the independence or the autonomy of the states is preserved and protected from interference by the federal government.

# CHAPTER V

## THE STATE AND THE FEDERAL LEGISLATURE

*The Importance of the Legislature.*—In all democratic states the legislature claims the position of prime importance among the organs of government as it reflects the national will or the will of the people. In a monarchical state, the monarch is the sole person who is the fountain head of all legislative, executive and judicial functions of the state. With the transformation of the state from the monarchical to the republican form, the balance of power shifted from the single omnipotent person of the monarch to the mass of the people who could express their will through a folk moot or the general assembly of all the citizens as in the small Swiss cantons, or through a body of chosen representatives of citizens forming a legislative assembly as is seen in all democratic or even semi-democratic states in the world. As a body representing the will of the supreme people, the legislature commands greater power and respect than the executive or the judiciary, the function of the former being to execute or enforce and of the latter to interpret the commands of the legislature. In a unitary state the legislature is usually omnipotent as Parliament is in England. In a federal state, the scope of the powers of the three organs is defined by the constitution and each is supreme within its own sphere; even then, in practice, the legislature has still the preponderating

influence in the state because law-making is essentially the most powerful function. Moreover, apart from its legitimate legislative functions, the legislature usually performs certain executive and judicial functions which considerably enhance its importance. We, therefore, proceed to discuss the relation between the unit or state in a federal union and the federal legislature, both in respect of its composition and ambit of authority on the one hand and in respect of the restrictions which it places on the autonomy or independence of the state on the other.

*Bicameralism in Federal Unions.*—Apart from the desirability or otherwise of the existence of two co-ordinate chambers of legislature in a unitary state, bicameralism appears to be an essential and inseparable attribute of federalism. It is usually in the senate or the upper chamber of a federal union that the federal idea is enshrined ; in that chamber is found the primary and effective guarantee for the preservation of this type of the constitution. The bicameral system affords an opportunity for giving special representation to the states as units of the federal union. In order to maintain the proper equilibrium between the component members and the federation as a whole, the former ought to be represented in one chamber of the legislature without regard to population, that is, represented as distinct and equal political organisations. This, in fact, is the principle upon which the legislatures of most states having the federal form of government are at present constructed.

*Methods of Composition of the Legislative Chambers.*—The legislatures of federal unions are universally bicameral. Reason and experience both suggest that if legislative bodies are so organised, the two chambers should be constituted on different basis and principles. Generally, the lower chamber is supposed to represent the people or the citizens of the union as a whole as distinct from the states, and elected on the basis of population. But even in the representation in the lower chamber the existence of the states as independent entities is generally re-

cognised by the insertion of the condition that whatever the population might be, every state must have at least one representative. The upper chamber, on the other hand, is supposed to represent the states or the units as such. The method of selection of members, however, is different in different countries. In some countries the upper chamber is composed of members elected directly on the same basis as that upon which the lower chamber is elected or on a similar one. The prominent illustrations of this type are the United States of America and Australia. In some, it is composed of members nominated by the states and who represent the states as such, as in Germany. In some others, there is a combination of both these methods of selection as in Switzerland and India. But, with all these variations in the selection of members, the second chamber in all federal constitutions is expected to represent the individual states.

*Composition of the Lower Chambers.*—(*a*) In the United States of America, the House of Representatives is the lower chamber. It represents the nation but is less distinctive than the Senate as regards competence and composition. Yet even this House bears unmistakable marks of its origin; like the Senate, 'it is based upon a recognition of the fact that the states are positively self-contained and in large measure autonomous'. (MARRIOT—*Mechanism of the Modern State.* Part I, p. 137). The representatives are apportioned by Congress among the several states according to population, each state having at least one representative. It is the state which determines not only the electoral franchise, subject to the general limitations of the constitution, but also the method of voting.

(*b*) In Switzerland, the National Council is the lower chamber of the Federal Assembly and represents the people directly. The number of members is distributed over 50 constituencies. The electoral districts are as equal as conditions permit, but every canton must have at least one member, and

districts may not cut across cantonal frontiers, thus preserving the distinct identity of each canton.

(*c*) In Imperial Germany, the lower chamber or the Reichstag was a national body as contrasted with the Bundesrath which was organised on a federal basis. Members of the Reichstag were chosen for five years by electoral districts each of which returned one member and which were laid out in such a way that no district embraced portions of two or more states. In Republican Germany, the members of the Reichstag are elected for four years by universal, direct, equal and secret suffrage of all men and women over twenty years on the principle of proportional representation.

(*d*) In Canada, the lower chamber of the Dominion Parliament is the House of Commons. It has 245 members elected on the basis of adult franchise. The number of representatives for Quebec is fixed at 65 and the number for each of the other provinces is determined after each decennial census, so that, generally speaking it will bear the same ratio to 65 as the population of the province bears to that of Quebec.

(*e*) In Australia, the House of Representatives which is the lower chamber of the Commonwealth Parliament, is elected directly by the people of the Commonwealth. The constitution lays down that the number of members shall be as nearly as practicable twice the number of senators. The seats are distributed mostly in single-member constituencies among the several states according to population.

(*f*) In India, the House of Assembly, or the Federal Assembly, is the lower federal chamber. It consists of 250 representatives of British India and not more than 125 representatives of Indian States. The number of States representatives, however, depends upon the number of States which accede to the Federation. But in the matter of selection of the members of the lower chamber, the Federal Assembly differs from those of all the federal unions in the

world. So far as British Indian representatives are concerned, the election is indirect with special reservations for the different religious communities, labour, commerce, etc. The State seats are distributed amongst the States according to population and importance and the representatives are to be nominated by the rulers of the States.

*The Composition of the Upper Chambers.*—We have noticed that the federal idea is enshrined in the upper chamber of the legislature which effectively guarantees the equality of the states in the federal structure.

(*a*) The Senate of the United States affords a conspicuous illustration of this truth. According to the original design of the constitution, the Senate was to represent the constituent states and the members were to be elected by the state legislatures. Under an amendment made in 1913, senators are elected by direct popular vote instead of by the legislatures. But this change in the method of election does not touch the fundamental principle upon which the senate is based—the absolute equality of the states. Each State, whatever its size or population, sends two representatives to the Senate. Of all the fundamental principles of the American Constitution, the most rigid and unalterable one is that 'No State can be deprived of its equal suffrage in the Senate without its consent' (*Art.* 5), a consent which would not, under any imaginable circumstances, be given. The original design of the constitution shows that senators represented the states as their ambassadors and even after the introduction of direct election 'there is still a disposition in some minds to regard them somewhat as ambassadors accredited by the states to the national government!' (GARNER—*Political Science and Government*, p. 671).

(*b*) The same principle as that on which the American Senate was based is to be seen in the Standerat or the Council of States in Switzerland. This upper chamber consists of 44

members, two for each of the twenty-two cantons. The manner of election and the qualification of members, the tenure of office and the amount of remuneration are not regulated as they are in the United States by the Constitution or the Federal authority but are left to be determined quite independently by the several cantons. Consequently there is little uniformity. In most cantons councillors are chosen by popular vote, but in seven they are elected by the legislatures.

(*c*) In Imperial Germany, however, the federal principle of equality of representation was not followed in the case of the German Bundesrath. The states were unequally represented, approximately in proportion to their size. Of the 58 members of the Bundesrath, Prussia claimed no fewer than seventeen; Bavaria six; Saxony and Wurttemberg four; Baden, Hesse and Alsace-Lorraine three; Mecklenburg-Schwerin and Brunswick two; and the rest of the states and free cities one a piece. The votes of each state which was entitled to more than one vote were cast together as a unit and each such state could cast her full vote whether or not it had its full number of representatives present. The smaller states sometimes combined into groups and each group delegated its power to a single person who was authorised to represent them severally. Members were sent and withdrawn at the pleasure of their respective governments. "In form, in theory, and indeed in fact, the Bundesrath was a body of ambassadors. Its members represented the governments of the states from which they came and were accredited to the Emperor as diplomatic agents, plenipotentiary *charges d'affairs*, to whom he must extend the same protection as was extended to the like representatives of foreign states... It followed, of course, from this principle that the members of the Bundesrath were only the agents of their governments and acted under instructions from them, making regular reports of the proceedings of the Bundesrath to their home administrations. The votes of a state were valid whether cast

by its representatives according to its instructions or not, but the delegates were responsible for every breach of instruction to their home authorities. The Bundesrath was a sort of a larger Imperial Council in which the responsible ministers of the several states drew together to determine all questions of general interest whether they affected the making or administration of the laws" (WOODROW WILSON—*The State* pp. 449-50). In Republican Germany, the upper chamber which is termed Reichsrath, represents the states or landers as such, rather than the people, as was the case with the old Bundesrath. The inequality of representation of the units still continues. Representation is conferred in terms of votes rather than members, although as many members as the number of votes can be sent. Each state having a population under one million is entitled to one vote, each having a population of more than one million is entitled to a vote for each million people and to an additional vote for any fraction thereof which equals the number of inhabitants of the least populated state. But no state may have more than two-fifths of all votes, a provision obviously designed to curb the power of Prussia. The states are required to be represented in the Reichsrath by members of their cabinets who are bound to vote according to the instructions of the state. The vote, therefore, is a state vote and can be given by one delegate, but is multiplied to the power of the state representation.

(*d*) Like the second chamber in Germany, the second Chamber in Canada is not typically federal to the extent of the Senate in the United States. The Senate of Canada as originally constituted embodied and emphasised the federal idea by giving equal representation to the Provinces. But in subsequent amendments this principle has not been maintained. Senators are not even nominated by the Provinces as in Germany but are appointed for life by the Crown that is, in practice, on the advice of the responsible ministers of the Governor-General.

(*e*) Like the American Senate, the second Chamber, or the Senate, in Australia represents the federal principle; it stands for the constituent states and accords to each state equal representation. The Senate consists of thirty-six members—six for each of the states. The constitution provides that the equality of representation cannot be changed without the approval of the state affected. The senators are chosen directly by the people of each state, voting as one electorate. They are elected for six years and half the senators retire triennially. The voting in the Senate is personal and not according to the states and each question is decided by a simple majority. The Senate has a perpetual existence which can be cut short in the event of a constitutional deadlock by dissolution.

(*f*) In India, the upper chamber is called the Council of State. Excepting in its very existence, there is no similarity between the Indian upper chamber and the upper chambers in other federal unions. The representation is not given on the basis of equality among the units. The maintenance of equality of representation for each sovereign unit, which would include even the smallest sovereign state, was obviously impossible. But there is no equality even between the two main units of the Federation, namely British India and Indian States. The composition of the Council of State is 156 members for British India and up to 104 for the States. The number in the case of the States depends on the number of States acceding to the Federation; so long as a tenth of the possible seats is vacant, the members appointed to the seats filled may choose additional members up to half the number of seats unfilled but this power shall not last for more than twenty years. British Indian seats are allocated to the Provinces roughly in proportion to the population, and are to be filled by direct election with the exception of six to be filled by nomination by the Governor-General so as to secure due representation to the depressed classes, women and minority communities. The seats allotted to

the States are distributed amongst them having regard to their dynastic salutes, importance, population etc. Some of the bigger States get independent representation while smaller States have been grouped together, the rulers choosing representatives jointly or in rotation. The States representatives will be, of course, nominated by the rulers and whether they can be recalled is not definitely stated in the Government of India Act, 1935. The Council of State is a permanent body, one third of the total number of members retiring and being replaced every three years.

*Comparative Position of the two Chambers.*—We have noticed that, in general, the principle of representation in the federal legislature is that the upper chamber represents the component states while the lower represents the people of the federal state. In order to appreciate the influence of the state in federal legislation, we proceed to analyse the comparative importance of the two chambers of the federal legislature.

(*a*) In the United States, the legislative authority of the Senate is, except in regard to finance, co-ordinate with that of the House of Representatives and is, in practice, exercised with a freedom to which many second chambers are strangers. Although finance bills must originate in the House of Representatives, the Senate enjoys and exercises the same power of amendment and rejection as in regard to other bills. Like the English House of Lords, the Senate performs the judicial function of trying impeachments. The constitution vests the sole power of impeachment in the House of Representatives and the sole power to try impeachments in the Senate. In other matters the Senate is distinctly superior to the lower chamber. Of all the attributes of the American Senate the most distinctive is the fact that it shares with the President two important functions : (1) the right of confirming appointments of all persons nominated by the President to act as ambassadors and judges of the Supreme Court and other federal judges, officers or minis-

ters and (2) the right to approve treaties and foreign engagements. In each of these cases the concurrence of two-thirds of the Senators present is, however, essential. Not only is the Senate more powerful and more influential in these matters than the House of Representatives, it is, in fact, the strongest second chamber in the world. "The fact that the Senate represents the States is what makes the Federal Government a union of States. It is in its character as the institution which represents all the States that the Senate shares the control of foreign policy and the treaty-making power—the essential attributes of the sovereignty of the States. By reserving those rights to the Senate, the States preserve their own sovereignty and assert the principle that the central government is only a union of States. The ambassadorial character of the Senate and its share of power constitute what may be called the institutional guarantee of the States as distinct from the juridical guarantee of the constitution and the judicial guarantee of the Supreme Court". (HAKSAR and PANIKKAR—*Federal India*, pp. 52-53).

(*b*) Like the American House of Representatives, the National Council in Switzerland represents the people and the Standerat or the Council of State, like the American Senate, represents the constituent states. The Council of States embodies the 'federal' as opposed to the national principle but unlike the American Senate it has no special functions which differentiate it from the lower house. The initiation of legislation belongs equally to both houses and is in fact divided between them by their respective presidents at the beginning of each session. The authority and functions of the two chambers are coordinate in all respects. In the exercise of certain electoral and judicial functions, they act as a single assembly in joint session.

(*c*) In Imperial Germany, the Bundesrath occupied a far more important position than the Reichstag. All functions not specially entrusted to any other constitutional authority

remained with it and no power was in principle foreign to its jurisdiction. In its legislative capacity, it guided the whole course of legislation. The Reichstag had the right to originate measures but in practice, most bills first passed the Bundesrath and then went to the Lower House. The Reichstag had the right of amendment but nothing that it suggested could become law without the assent of the Bundesrath. A peculiar power of the members of the Bundesrath was that all its members had the right to be present in the Reichstag and to express the views of their governments upon the legislation pending before the house. The Emperor could dissolve the Reichstag at any time with the consent of the Bundesrath. Speaking broadly, the Bundesrath made law, with merely the assent of the Reichstag. In the Republican constitution, the balance of power has shifted from the Reichsrath, which takes the place of the old Bundesrath, to the Reichstag. If the Reichstag passes a bill and it is not assented to by the Reichsrath, the President may submit it to popular vote. In short the Reichsrath is a checking and revising authority which is designed to serve most of the purposes of a second chamber elsewhere but it is not a coordinate branch of the legislature. The National Assembly or the Reichstag is to all intents and purposes a unicameral parliament. The reversal of the old relations between the Reichstag and the Bundesrath is quite obvious.

(*d*) In Canada, the legislature follows generally the procedure of the Imperial Parliament and like the House of Commons in England, the House of Commons in Canada is the more powerful chamber. The powers of the Senate are not defined by law excepting that it has been laid down that money bills must originate in the Lower House. There is also no provision for the solution of a deadlock although additional members to the extent of four or eight can be nominated by the King. But this right has never been exercised. Not being based on the true federal principle it has from the beginning

lacked the strength of the Upper Chamber in other federal constitutions. It is merely a revising body. The main functions of the Senate are to revise legislation passed by the Commons, to give preliminary considerations to measures on which there is not likely to be serious disagreement and to handle by means of private bills divorce cases which for various reasons are not or cannot be dealt with in the courts. The Senate is, in fact, the weakest second chamber in the world. Prof. Goldwin Smith pronounced the Canadian Senate to be 'as nearly a cipher as it is possible for an assembly legally invested with large powers to be'. (*Canada and the Canadian Question*, p. 163).

(*e*) In the Commonwealth of Australia, as we have seen, the federal principle has been preserved in the composition of the Senate. The powers of the Senate are normally equal with those of the lower House excepting that it cannot originate money bills which must originate in the House of representatives. In case of a deadlock, the Governor-General may dissolve both the chambers and if even after re-election the deadlock continues, a joint session of the two chambers is convened and the fate of the bill is decided on the decision of the absolute majority of the total members of the Commonwealth Parliament. "Not having any special functions such as that of control of appointments and of foreign policy which gives authority to the American Senate, its Australian copy has proved a mere replica, and an inferior replica, of the House. Able and ambitious men prefer the latter, because office and power are in its gifts, and its work is more important and exciting, for most of the ministers, and the strongest among them, are needed there, while the Senate is usually put off with two of the less vigorous. Thus from the first it counted for little". (BRYCE—*Modern Democracies*, Vol. II, p. 304-5).

(*f*) In India, under the Government of India Act, 1935, both the chambers of the legislature will have coordinate powers and provision has been made for a joint sitting of the two

chambers if a bill is passed by one chamber and rejected by the other. There is only one exception to the coordinate powers of the two chambers and that is, demands for grants will be made to the lower chamber or the House of Assembly and thereafter to the Council of State. If the Assembly rejects the demand it may be submitted to the Council of State by the Governor-General, and in case of disagreement between the two chambers the matter will be decided at a joint sitting of the chambers. Owing to the peculiar nature of the composition of the two chambers, it is premature to say which one of the chambers will carry greater weight in the actual field of federal legislation. The establishment of the federation and the actual working of the federal legislature for some time will alone reveal the relative strength of the two chambers.

*Scope of authority of the Federal Legislature and the Autonomy of the States.*—In our study of the comparative position of the two chambers of the Federal legislature, we tried to analyse the extent of the powers which the second chamber, which generally represents the States or units, enjoys or, in other words, to consider the extent to which the component states can influence the course of federal legislation. We now proceed to study the actual division of legislative power between the federal legislature and the states in the different federal unions and try to see what autonomy or independence is left to the states in the domain of legislation.

(*a*) Starting with the United States of America, one notices that the broad basis of the division of the powers is that the powers of the federal government are limited and explicitly defined while the whole of the residue rests in the states. All the powers of the federal government are such as affect interests which it would be difficult, if not impossible, to regulate harmoniously by any scheme of individual state action ; all other powers whatever remain with the States. Briefly stated, Congress has the power to lay and collect taxes, duties,

imposts, and excises and to borrow money on the credit of the United States. Congress can take measures to promote the common defence and welfare, control the monetary system, maintain post offices, grant patents and copyrights, deal with offences committed on the high seas or against the law of nations, to declare war and make peace. It can also regulate international and interstatal commerce. But some of these powers are not exclusively exercised by Congress and a certain latitude is allowed to the States. In addition to the powers which are expressly delegated to Congress, there are certain restrictions placed upon the legislative powers of the States. No State, for example, may pass any bill of attainder, *expost facto* law, or law impairing the obligation of contracts or grant any title of nobility. Similarly no State can keep troops or ships of war in time of peace, enter into any agreement with another State or foreign power without the consent of Congress, or engage in war unless actually invaded or in imminent danger of being invaded. But these distinctions are in a sphere which normally belongs to the federal government. Such vital functions of government as law and order, civil law, criminal law, the local government, education, public health, the raising of the militia, and the general police power are in the hands of each individual State. The powers vested in each State are all of their original and inherent powers, which belonged to the State before it entered the Union. Hence they are *prima facie* unlimited and the presumption is always in favour of a state unless proved to the contrary.

(b) Like that in the United States, the division of powers in Switzerland is made on the basis that the national or the federal government has certain defined powers while the residue is left to the cantons. The Constitution has assigned to the federal legislature a large sphere in the making of laws. Such subjects as the civil and criminal law, commercial obligations, child labour, insurance, issue of bank notes, marriage,

traffic in food and commodities which are dangerous to health, sanitary police, etc. are within the province of the federal legislature. Besides these large powers of legislation of a general nature, the important functions of the Swiss legislature are of a constituent, an electoral, an executive and judicial nature. The electoral function consists in the choice of the Federal Council, the Federal Court, the Chancellor and other officials. On its executive side, the Federal Assembly declares war and makes peace, guarantees the constitutions and territories of the cantons, grants amnesties and pardons, takes measures for internal order and security and approves all alliances and treaties with foreign powers as also all agreements made by cantons among themselves or with foreign powers, in case the Federal Council or any of the cantons protests. It controls the federal army and supervises the federal administration and the Federal Court. These functions are in part performed by the Federal Council but this executive agency is in all such matters absolutely under the control of the legislature. The legislative authority is supreme and the Federal Court has to apply the law passed by the legislature and has no authority to question its validity even though it may appear to conflict with the constitution. Unlike the American Constitution, the Swiss constitution "has made the federal legislature the sole judge of its own powers, the authorised interpreter of the constitution and an interpreter not likely to proceed on purely legal grounds". (BRYCE—*The American Commonwealth*, Vol. I, p. 260). With all the powers enjoyed by the Federal legislature, there is still a large field left for the cantons in matters of legislation. Under certain restrictions, the cantons can make treaties with foreign states concerning border and police intercourse and the management of public property and can make concordats among themselves upon various subjects. The powers of the cantons include taxation, except customs duties, education (subject to the general supervision of the Federal Government), industrial

legislation and so much of commercial and criminal legislation as has not been taken over by the Federal Legislature. Although the sphere of cantonal legislative jurisdiction has been reduced in many respects it has still its importance as pratically the whole work of execution of the federal law is entrusted to the canton. The cantons, therefore, have a strong hold upon the interest and affection of their inhabitants.

(c) Germany, Imperial as well as Republican, presents an altogether different picture than the constitutions of the United States and Switzerland. In Imperial Germany the sovereign legislative power of the Empire was unlimited and covered the entire field of civil, criminal and commercial law. Even the constitution could be amended by the ordinary process of legislation and so change the allotment of powers between the federal and state governments. The individual states retained their rights only by the sufferance of the Empire. Although it was a fundamental principle of the Imperial constitution that the Empire had sovereign legislative power, the Empire occupied only a part of the great field opened to it and confined itself as a rule to mere oversight. There was a no less extensive domain reserved entirely to the states. The determination of their own forms of government, of laws of succession, of relations of church and state, and of questions pertaining to their internal administration, the budgets, police, highway and land tenure laws, control of public instruction, etc. were some of the activities in which the states had considerable autonomy. The position has considerably altered under the Republican constitution. With the fall of the monarchies in the states the states have lost their importance. The legislative powers of the Federal Government are to a certain extent greater than under the Empire. While the constitution leaves the residuary powers to the states, the actual division of power is essentially centripetal. Exclusive jurisdiction is conferred over foreign relations, colonial affairs, citizenship, immigration,

naturalization, extradition, national defence, coinage, customs, posts, telegraphs and telephones. Full control over taxation and other sources of income is granted subject to the due consideration of the financial interests of the states. In matters like civil and criminal law and the law of procedure, press, public health, labour legislation, communications, etc., the Federal Government has full jurisdiction but so long as it has not been exercised the control remains with the states. Unlike any other federal legislature, the Federal legislature of Republican Germany has the extraordinary power of altering state boundaries or creating new states even against the will of the state affected. Thus in Republican Germany, the integrity and the autonomy of the states are completely at the mercy of the Federal Government and it is this characteristic which gives the Republican Constitution the unitarian character, although the federal form is ostensibly maintained.

(d) The legislative competence of the Canadian provinces is much more restricted than that of a unit in any other federal union. The very division of powers under the constitution gives definite powers to the provinces and leaves the unlimited residue to the Dominion Government. To the Dominion is given general authority to legislate for the peace, order and good government of the country in all matters not assigned exclusively to the provinces; and for greater certainty, but not so as to restrict the generality of this provision, twenty-nine clauses of subjects are enumerated as being, notwithstanding anything in the Act, within the exclusive competence of the Dominion Parliament. To the provinces are given executive powers to legislate in respect of sixteen specified clauses of subjects, concurrent powers of legislation respecting agriculture and immigration, and generally exclusive competence in educational matters. Thus the whole body of civil, criminal and commercial law and the law of procedure, as well as the law of marriage and divorce, is national and not local. The Domi-

nion has also other powers in such matters as trade and commerce, banking, promissory notes etc., which in the United States are left wholly or partially to the States.

(e) In the division of legislative power between the Federal and the State governments in Australia, the Federal government has received narrower powers than those enjoyed by the Dominion Government in Canada but in some respects wider than those of the National Government in the United States. The constitution leaves the residuary powers to the States. Interstatal and foreign trade, tariffs, currency, banking, patents, weights and measures, marriage and divorce, are in Australia federal matters. In addition, old age pensions and arbitration in labour disputes which extend beyond the limits of one state are also federal subjects. The States retain the right of legislation on property and general civil rights, industries, land administration, mining, railways, education, etc.

(f) In India, due to the divergent status of the units, there is a distinction of legislative authority both as regards the ambit and the subject matter. The power of the Federal legislature extends to making laws for the whole of British India and, among the States, only to the Federated States. As regards the subject matter, the constitution provides three lists, the federal legislative list, the provincial legislative list and the concurrent legislative list. The Federal list includes such subjects as defence, external affairs, currency, coinage, weights and measures, debts of the Federation, banking, salt, opium, income-tax, post, telegraphs and telephones, broadcasting, immigration and emigration, federal railways, ecclesiastical affairs, etc. These subjects are in all forty-seven and the States are expected to accept them as applicable to themselves. To the Provinces are left the subjects of land revenue, agriculture, local government, education, health, forests, mines, etc. The concurrent list includes criminal law and procedure, civil procedure, marriage and divorce, transfer of property, succession

and such other subjects. The general principle of distribution is that the Federal Government deals with such questions as are of national importance while leaving local or provincial questions to the Provinces. Within their own spheres the central and the provincial governments enjoy full autonomy subject to the discretionary and special powers of the Governor-General.

*Conflict of Federal and State Laws* :— In the actual process of legislation there are bound to be cases in which either the Federal or the State government exceeds the limit of the authority vested in it by the constitution or in other words, passes a law which is *ultra vires* according to the constitution. There are also cases which arise in the field of concurrent powers of legislation wherein the laws of the state may be at variance with laws on the same subject passed by the federal legislature. Let us proceed to study how a solution has been found out by the framers of the constitutions in different countries to settle this conflict of jurisdiction between the federal government and the state.

(a) In the United States the powers conferred by the Constitution are strictly definite and defined and the powers left to the States are undefined. Federal legislation is as much subject to the Constitution as that of the State and an enactment of either legislature which is opposed to the Constitution is declared null and void by the Courts. The Federal Government has no power to annul or disallow State legislation, except when the legislation in question is deemed to change the republican character of the State. There are certain subjects in which the Federal, as well as the State, Government can pass legislation but whereas the Federal law supersedes the state law, the operation of the state law is only suspended and if and when the Federal Statute is repealed, the State law becomes valid once more.

(b) In Switzerland the position is a little different than in the United States. The Federal Supreme Court has power

to declare invalid acts of the cantonal legislatures which are in conflict with the Federal Constitution but it cannot inquire into the constitutionality of laws passed by the Federal legislature even if they may appear to contravene the provisions of the constitution. The Federal authorities have no power to disallow or annul a cantonal law, but cantonal constitutions and any amendment therto require the assent of the Federal government, nor will the Federal government recognise any article in a cantonal constitution which is repugnant to the Federal Constitution.

(c) The Constitution of Imperial Germany invested the central government with definite powers and left the undefined residue to the States. No courts had the authority to declare Imperial legislation unconstitutional if it went through the legal process of legislation, but State legislation was void if it conflicted with Imperial legislation or the Constitution. The Republican Constitution of Germany affirms the supremacy of the national laws over state laws and declares that in cases of differences of opinion as to whether a state law is compatible with a law of the Reich, the competent national or state authority may request a decision from a superior judicial court of the Reich. But both the Imperial and Republican constitutions do not directly invest the central government with the power to declare the laws of the state void.

(d) In the Dominion of Canada it is well settled that acts of the Dominion and Provincial Parliaments which are in conflict with the British North America Act and Provincial acts which are contrary to the acts of the Dominion Parliament can be declared null and void. The Dominion Parliament, however, has the exceptional power of disallowing any act passed by a Provincial legislature.

(e) As in the general structure of the federal government Australia follows the practice of the United States in this respect also. Both federal and State laws are subject to the limi-

tations of the constitution. There is no power given to the Federal government to disallow any State law but the constitution lays down that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall to the extent of its inconsistency be invalid.

(f) In India, so far as the federal list is concerned, any law passed by the Federal legislature in respect of the subjects mentioned in the list supersedes any provincial law or law in a Federated state, whether prior or subsequent. In the concurrent sphere the doctrine that a federal act supersedes a provincial act is not given effect to. While normally a federal act or a central act on a concurrent subject overrides a provincial law, if such an act has been assented to, after reservation, by the Governor-General, it prevails over prior federal legislation and before the federal legislature can vary such act the prior sanction of the Governor-General is essential even for the introduction of the proposal. Invasion of the provincial sphere by the federal legislature may also be authorised by the Governor-General in cases of emergency.

*General Conclusions* :— The composition of the federal legislature has been universally bicameral. The upper chamber is intended not merely to serve as a revising body or a check upon hasty legislation of the lower chamber, which is normally more amenable to gusts of popular opinion, nor is it intended as a safe place for persons who can serve the state with their experience, knowledge or position. "So far as the United States Senate is concerned and to a certain extent this may be said of the upper chambers of federal unions generally—its creation was certainly the result quite as much of political necessity (the necessity as it was then understood of providing a second chamber in which the individual states as such could be represented) as of any belief as to the inherent superiority of the bicameral system". (GARNER—*Political Science and Government*, p. 613). The lower chamber is generally supposed

to represent the people of the State and is composed of members who usually represent the people directly except in India where British Indian representatives are elected through the provincial legislatures and the States representatives are nominated by the Rulers of different States. But the Second Chamber stands as the embodiment of the federal idea and is a place where the component units have the right to be equally represented irrespective of their size or population. However, in practice, the Second Chambers exhibit a wide diversity both in their composition and competence. While the Senates in the United States and Australia, as also the Council of States in Switzerland, follow strictly the federal principle in assigning absolute equality to the units, the upper chambers in Germany, Canada and India are differently organised. Representation on the basis of population as well as relative importance was resorted to in the case of the Imperial Bundesrath and the Council of State in India. In Republican Germany population is the sole basis of representation to the Reichsrath. Canada follows a different line altogether. There is neither equality of representation of the units nor representation on a population basis. As regards the method of selecting the members of the upper chambers, the constitutions of the United States, Australia and, to a certain extent, Switzerland prescribe direct election by the people while the Imperial as well as the Republican constitution of Germany prescribes nomination by the governments of the respective states. In India, the Government of India Act prescribes direct election for British Indian representatives and the States are expected to nominate their representatives. In Canada members are neither elected by the people nor nominated by the provincial governments but are appointed by the Crown for life. In respect of the competence of the upper chamber a distinction can be drawn between the upper chambers in the federal Unions outside the British Empire and those within the Empire. While

the Bundesrath in Imperial Germany was exceptionally powerful, the Senate in the United States also is certainly a powerful and influential body. Even the Swiss Standerat, though not as powerful as the Bundesrath or the American Senate, is really co-ordinate with the lower chamber and is in no way inferior in status to that body. On the other hand, within the British Empire, both the Canadian and Australian Senates are decidedly subservient to the lower chambers, a result perhaps of the unconscious imitation of the British Parliament. The two Chambers in India are theoretically co-ordinate and the practical results are yet to be seen. In most of the federal unions the division of powers between the federal and the state governments follows the principle of defining the powers of the federal government and leaving the residue to the States. Usually such questions as war and peace, foreign relations, international and interstatal commerce and all those affairs which are of common interest to the whole union are left to the federal government. But opinions have always differed as to what affairs require uniform regulation and hence the division of powers has been different in all federal unions. In Germany and Canada, for example, many affairs are treated as being of general interest, and hence requiring uniformity of regulation, which in the United States are left to local regulation. In matters of legislation, a greater independence is therefore left to the states in the United States than in any other union, the least degree of independence being enjoyed by the provinces in Canada or the Länder in Republican Germany. In the case of conflict of jurisdiction between the Federal government and the states, while in the United States the States can appeal to the judiciary for protection against federal encroachments, no such right exists in Switzerland where federal legislation is final. Australia follows closely the American model but the powers already granted to the federal government are much more than in the United States and secondly the Constitution

lays down that if a State law is repugnant to a federal law on the same subject, the State law is invalid to the extent of the repugnancy. In India, the division of powers according to the Government of India Act leaves a wide range of powers to the provincial governments, but the existence of the extra-ordinary powers vested in the Governors of the provinces as well as the Governor-General of India in legislative and executive matters, makes the autonomy of the units more or less illusory.

## CHAPTER VI

## THE STATE AND THE FEDERAL ADMINISTRATION

*Introduction* :— Next in importance to the Federal Legislature, comes the Federal Executive. It is the duty of the Federal Executive to execute the commands of the Legislature or to enforce its laws. The Legislature can lay down broad principles or even specific directions but it is the Executive which has to put them into effect and thus the Executive comes in direct contact with the governments of the States. In this chapter, we shall examine the relationship between the State and the Federal executive or the administrative relation between the two. This relationship can be discussed from three different aspects (1) Federal control and coercion (2) execution of Federal laws within the State, (3) Federal intervention in purely local affairs.

*Composition of the Federal Executive* :— While all federal legislatures give prominence to the federal principle by introducing the device of equality of representation of the constituent units or at least some representation of the units as such, no such principle is observed in the composition of the Executive in any federal union. The executive power of the United States is vested in the President who is chosen by direct popular election. The ministers, who are called secretaries, are appointed by the President and can be dismissed by him. No consi-

deration of representation of the units is made in these appointments. In Switzerland the Federal Council which consists of seven members, is elected by the Federal Legislature and an approach to the federal principle can be seen in its composition. Sec. 96 of the Swiss Constitution says that not more than one person from each canton may be chosen for the Federal Council. In actual practice, certain cantons maintain their title to special representation in the executive. There was no such question of federal representation in Imperial Germany, since the whole of the executive power of the Empire was vested in the German Emperor who appointed the Chancellor to carry out the duties. The Chancellor was the servant of the Emperor and was responsible to him alone and not to the legislature and still less to the constituent States. In the constitution of Republican Germany, the executive is parliamentary and is made responsible to the Reichstag. Similarly, Canada and Australia have also their executives of the parliamentary type, responsible to the legislature and composed of members who need not secure representation of the units as such. The provision for the formation of the executive under the Government of India Act is somewhat different from what is seen in other federal constitutions due to the complex nature of the units of the Federation and to the necessity of balancing the various communal and other interests. The executive authority of the Federation has been vested in the Governor-General. For carrying out his duties the Governor-General will be assisted by two sets of ministers. One set consists of ministers, called counsellors, who are appointed by the Governor-General and are responsible to him alone; they deal with the special departments reserved for the Governor-General to be administered in his discretion. The second set consists of ministers appointed by the Governor-General from among those who are likely to command the confidence of the legislature. These ministers will be in charge of those subjects which are entrusted by the

Act to the Federation. Though there is no specific mention in the Act, it is understood that the Governor-General will so choose his ministers as to secure the due representation of the minorities and the Indian States. Such a direction is contained in the Instrument of Instructions issued to the Governor-General by His Majesty. Thus an effort to secure representation to the Indian States, assuming them to be one unit, has been made in the formation of the Federal executive in India.

*Federal Control and Coercion* :—In virtue of its superior position as the union of the several States and of its international or statutory obligations, the Federal Government is usually endowed with specific powers to control the constituent States and to use coercive measures against a State which dares to act against the Constitution or defies the authority of the Federal Government. If the Constitution does not specifically give such powers, they are presumed to exist by implication. Thus in the United States of America it is made the duty of the National Government to see that only republican governments are maintained by the individual States from which it is inferred that the National Government may prohibit such local organisations as do not in its judgment conform to this requirement. Similarly if a state attempts to resist the legitimate action of federal officers in course of their duty, the President must support his agents by force of arms if necessary. Although the constitution does not give any explicit powers to the Federal Government in the United States to coerce a State into obedience, the Supreme court has held that "the United States has power 'to brush away every obstacle' to the enforcement of its authority on every foot of the national territory" (GARNER—*Political Science and Government*, p. 352). In Switzerland the Federal Government is directed by the constitution to see that the cantons provide free, compulsory, non-sectarian education for their people and that the political rights and liberties of the individuals are respected by cantonal law.

The Federal Government is responsible for the maintenance of good relations between the cantons themselves and between the cantons and the National Government, and generally to provide for the preservation of order, and ultimately for the maintenance of the law throughout the whole country. It is the imperative duty of the Federal Council to supervise the conduct of all Federal officers and employees and to enforce the observance of the Federal Constitution and the guarantee of the cantonal constitutions. To this end it has the power to enforce its will by the use of armed force, if necessary, but this is hardly ever necessary. "Swiss practice", says Lord Bryce. "allows the Federal Government to coerce a disobedient canton. This is commonly done by quartering Federal troops in it at its expense till its government yields—a form of coercion which Swiss frugality dislikes—or by withholding its share of federal grants" (*American Commonwealth*, Vol. I, p. 337). In Imperial Germany, the constitution empowered the German Emperor to coerce any recalcitrant state into obedience. The Emperor was the commander-in-chief of the German army and it rested with him in his capacity as the commander to coerce into obedience such states of the Empire as might at any time wilfully and pertinaciously neglect to fulfil their federal duties. But in all such cases, he was required to obtain the assent of the Bundesrath which, as already observed, was composed of members nominated by the States themselves. The Constitution of Republican Germany authorizes the President to compel a state by force of arms, if necessary, to perform the duties imposed upon it by the constitution or the national law. The constitutions of Canada and Australia do not give any specific power of coercion to the Federal Government against a province or state but it can be presumed since the federal government will be a mockery if its directions and orders, issued by it within its jurisdiction, can be openly disregarded by the constituent units. In India, it has been expressly provided that

the executive authority of the Provinces and the Federated States shall be so exercised as to secure respect for the laws of the Federation applicable to the Provinces and the States. No power of coercion has been specifically enumerated in the Government of India Act, 1935, but in view of the immense power in the hands of the head of the Federal Government, as Governor-General in British India and as the Representative of the Crown in relation with the Indian States, such a specific power is hardly necessary.

*Execution of Federal Laws within the State.*—For the enforcement of Federal law within the dominion of a province or state in a federal union, two methods are usually followed. The first method is the one by which the Federal Government possesses its own officials and governmental machinery for enforcing its laws, collecting its revenues and performing all other services with which it is charged. The other method is to leave the practical administration of the laws to the states themselves, the Federal Government keeping a general supervision over their enforcement. Each system has its advantages and disadvantages. Reliance upon the State or local authority avoids the duplication of administrative machinery, but it possesses the disadvantage which results from throwing upon the local governments responsibility for the execution of national laws and the defence of national policies to which they, often supported by local public opinion, may be opposed or to the enforcement of which they may be indifferent. In order to insure that Federal legislation shall be properly executed by local governments, some federal constitutions provide for federal supervision, inspection or even coercion by the Federal Government and also empower the Federal Government to issue instructions to the State governments as to how federal laws are to be put into effect. In the United States there are two parallel systems of administration working in a state, the federal officials for the enforcement of federal laws and the decrees of

the federal court, and the State officials for the performance of duties relating to the governments of the States themselves. There is a complete hierarchy of Federal officials, who function, each in the appropriate sphere, side by side with the hierarchy of the component States. Thus in the United States, as the Federal government enforces its laws almost entirely through its own officials, it can continue to function almost normally if the governments of the States were to be suddenly blotted out. This is not the case in Switzerland or Germany. Switzerland is an instance of what is known as legislative centralization and administrative decentralization. Like the Imperial Constitution of Germany, the Swiss has assigned to the central legislature a large sphere in the making of laws while leaving it to the local governments to carry them into execution. The main business of the central executive—the Federal Council—is to see that the cantonal officials do their duty. The Swiss Federal Government has its own machinery for several important branches of adminstration. But except in regard to foreign and military affairs, customs, posts and telegraphs, and the monopolies for the production of alcohol and gunpowder, the Federal Council has no direct executive authority. In other branches it has to rely largely upon the co-operation of the cantonal authorities, working under a certain amount of federal supervision. This is true in the administration of railways, water power, weights and measures, education, military exemptions and even the Federal Bank. Even the Federal Court has no officers of its own to execute its decrees. The system in Imperial Germany was to a large extent similar to that in Switzerland. Although the Empire had tremendous powers of legislation, it left the execution of these functions almost entirely to the States. It was the duty of the Chancellor to superintend the administration of the laws of the Empire by the States, but in their administration the Empire could not only command what was to be done but might also prescribe

the way in which it should be done. Otherwise, the judges of all but the Supreme Imperial Court, the tariff officials and gaugers, the coast patrol officers and the district military authorities were all State officers. In the case of a difference of opinion between the Chancellor and a state, the Bundesrath had the final decision. The position regarding the execution of federal laws has not materially altered even under the Republican Constitution in Germany. The Constitution declares that the laws of the Reich shall be executed by State authorities unless otherwise provided by law. Except for such matters as foreign affairs, national defence, coinage, customs, postal administration and a few other matters which are committed to the exclusive jurisdiction of the Reich, the Reich depends upon the officers of the States. The Federal ministry is empowered to issue instructions to the State authorities as to how the federal laws shall be carried out and it may despatch commissioners to the State governments to supervise execution of these laws. In Canada, the execution of federal law is left to the Provinces who work under the directions of the Federal Ministry. The Constitution of Canada lays down that for the performance of duties not assigned to the Provinces, the officers of the Provinces will be considered as officers of Canada. There is, therefore, no special existence of federal officers as in the United States. In India, the function of administering the laws of the Federation is entrusted to the Province or the Federated State, as the case may be, except in matters like the military, Post and Telegraphs, Railways, etc., and such other matters which the Federal Legislature may reserve for execution by Federal officers. In the execution of these functions, the Governor-General has the power to issue instructions to the Provincial Governor or to the Ruler of a State as to the manner in which a particular law is to be put into operation.

*Federal Intervention in Internal Affairs of a State.*—The

essence of federalism lies in the fact that it recognises the autonomy of the State, so far as it is compatible with the existence of a strong federal government. It is, therefore, not only the right but the privilege of every state to be left free to manage its own affairs without interference or intervention from the Federal government. In most federal countries, however, the National government has always claimed a certain right of intervention in local affairs, especially for the preservation of internal order. In the United States the Federal Government may intervene, by the use of armed force, if necessary, to supress domestic violence in any state, provided application has been made for such aid by the legislature, if it be in session or, otherwise, by the Governor. If the disturbance interferes with the operations of the Central Government, the process of the Federal Court or with the movement of interstate commerce, the President is not bound to wait for an application from the Governor or the State legislature but may upon his own initiative send federal troops to the scene of the disturbance and prevent such interference. This was what President Cleveland did in 1894 in the case of the Chicago Strike. But beyond this the Federal Government has no power to interfere in State matters. The position has been described by Lord Bryce thus: "'What then', the European reader may ask, 'is the National Government without the power and the duty of correcting the social and political evils which it may find to exist in a particular State, and which a vast majority of the nation may condemn? Suppose wide spread brigandage to exist in one of the States, endangering life and property. Suppose contracts to be habitually broken and no redress to be obtainable in State Courts. Suppose the police to be in league with assassins. Suppose the most mischievous laws to be enacted....Is the Nation obliged to stand by with folded arms, while it sees a meritorious minority oppressed, the prosperity of the State ruined, a pernicious

example set to other States? Is it to be debarred from using its supreme authority to rectify these mischiefs? The answer is 'Yes'. Unless the legislation or administration of such a state transgresses some provision of the Federal Constitution, the National Government not only ought not to interfere, but cannot interfere. Such a case is not imaginary.....There are parts of the country where justice is uncertain....There are districts where armed bands occasionally appear, perpetrating nocturnal outrages which no state police has been provided to check...But the Federal Government looks on unperturbed, with no remorse for neglected duty." (*American Commonwealth*, Vol. I, pp. 337-38). Similarly, "Thuggee, masquerading as Klu Klux Klan; mob fury sublimated by racial fires into lynch law; political and municipal corruption as practised by Tammany Hall; organised crimes and murder gangs, extolled by the cinema—all these, before which any misgovernment in Indian States pales into insignificance, have to be tolerated by the Federal Government of the U.S.A. because under the Constitution it has not the right to intervene." (HAKSAR and PANIKKAR—*Federal India*, pp. 93-94). These two extracts have been given to stress the importance of the autonomy and sovereignty of the units or states in Federal unions. The Constitution of the Swiss Confederation makes it the duty of the Federal Government to guarantee the integrity and 'sovereignty' of the cantons. Its right to intervene in cases of internal disturbance is affirmed by the Constitution and it is not necessary to wait for a request from the cantonal authorities. There have been several such cases of intervention, five of them being in the canton of Ticino alone. There was no specific power, for intervention in local affairs, given to the Central Government under the constitution of Imperial Germany but it can safely be said that in the case of serious disturbances within a state, which were likely to have their effects upon the Empire itself, the National Government would undoubtedly have in-

terfered under the large powers of execution and superintendence which it possessed. The Constitution of Republican Germany contains a specific provision that if public safety and order are materially disturbed or endangered the President of the Republic may 'take the necessary measures' to restore it and if necessary he may restore it by force of arms. To this end he has been empowered to temporarily suspend, wholly or in part, the liberties of the people as guaranteed by various articles of the Constitution and proclaim the existence of martial law. No such specific power exists under the constitutions of Canada or Australia but certainly the Federal government in these countries will intervene if the effects of any local action or disturbance are likely to extend beyond the limits of the Province or State. In India it is one of the special responsibilities of the Governor-General to maintain law and order in the whole of the Federation and to execute this special responsibility he can give any directions to the Provincial Governors who are bound to carry them out. In the case of the States, the Governor-General as the Representative of the Crown, has always claimed the right of interference in internal affairs on the ground of mis-government. This right is claimed under the general powers derived by him as the representative of the Paramount Power.

*The States and External Relations* :— Usually the units or states in a federal union are not expected to have any external relations independently of the Federal Government. Even inter-statal relations are controlled by that Government. The usual procedure is that in relation to foreign states or states outside the Federation, the federal union is a single unit, the separate units having no external significance. Thus in the United States of America the states have no *locus standi* outside the Federation although certain arrangements can be made by the states with foreign countries and other states with the permission of Congress. But in Switzerland the case is differ-

ent. A certain latitude is allowed to the cantons to enter into treaties with foreign states concerning border and police intercourse and the management of public property. The Constitution of Imperial Germany left even greater powers to the states. The Constitution did not exclude the several states from having their own independent dealings with foreign courts; it only confined them in such dealings to matters which concerned them without immediately affecting imperial interests. The subjects of extradition, for instance, of the furtherance of science and art, of the personal relations and private affairs of dynasties and all matters which affected the interests of private citizens individually were left to be arranged, if the States desired, independently of the Imperial Foreign Office. The States had, therefore, as full a right to send ambassadors for their own constitutional purposes as the Empire had to send ambassadors for its greater objects affecting the good government of the Empire. Even in Republican Germany, the Länders still retain a limited power to make treaties with their adjacent foreign neighbours. Within the British Empire, the Provinces in Canada have no right to deal directly among themselves or with the British Government. For their external relations they are completely under the control of the Dominion Government. The States in Australia, however, have succeeded in maintaining their right of dealing with the British Government without the medium of the Federal Government. The Australian Constitution leaves intact certain direct contacts between the States and the British Government which the Canadian Provinces have lost altogether. The Governors of the States are still appointed by the King on the advice of his ministers in the United Kingdom and they correspond directly with the Dominion Secretary. Important legislation is reserved for the assent of the King direct and not through the Governor-General In India, the Provinces have generally the same status as the Canadian Provinces. They have no right to enter into arrange-

ments with other Provinces or States without the intervention of the Federal Government. The Indian States have also gradually lost their right of independent negotiations with other States and all such negotiations and ultimate arrangements are carried out through the Government of India.

*General Observations* :—The study of the relations between the states and the federal executive in different federal countries reveals that the extent of power and independence enjoyed by the units varies in different countries according to their historical development and peculiar circumstances. While theoretically, the states are expected to be as independent of executive control of the federal government in their internal affairs as is compatible with maintaining the strength and solidarity of the central government, in actual practice there is a great divergence. In the United States, the Federal executive keeps itself completely aloof from the executive of the States, manages its own affairs and interferes within the jurisdiction of the States only in exceptional circumstances. This autonomy of the States is also effectively protected by the Federal Court to whom they can appeal for redress. But the case is otherwise in Switzerland or Germany. The Federal executive in these countries leaves most of the actual work of execution to the local governments but keeps an effective check and supervision over such execution. Thus in effect, for the execution of federal matters the states in these countries become the agents or subdivisions of the whole state as are the local districts in a unitary State. In matters of intervention in local affairs, there is a general uniformity in all countries ; they leave, as far as possible, the management and control completely to the states, the Federal Government intervening only in case of serious troubles likely to affect the whole country or on request of the state concerned or for the protection of the right and property of the Federation itself. The power of negotiating treaties with foreign powers which exist in the cantons of Swit-

zerland or existed in the States in Imperial Germany, although to a limited extent, is an indication of the respect which the constitution manifests for the autonomy and sovereignty of the states. In India, the autonomy enjoyed by the British Indian Provinces is much less than in the cantons of Switzerland or the States in Germany. The Governor-General has the general right to interfere in the internal affairs of any Province in the interest of order and safety of the whole of India. His discretion in such matters is final and no reference can be made to any court in India. In the matter of the Indian States, the Governor-General gets no such rights under the Government of India Act but he wields immense powers of interference within the domain of the States under his powers of Paramountcy which he exercises as the Representative of the Crown.

## CHAPTER VII

## THE STATE AND FEDERAL JUDICIARY

*Introduction* :— A Federation generally denotes an agreement or covenant between different units by which the legislative, the financial and the executive power of the Federation is distributed between the Federal government and the governments of the Federating units. Both the Federal Government and the units have to function within their limited spheres. The necessity of some organ independent of the executive and legislature is obvious and hence federal constitutions provide for the creation of a Federal Court. This court becomes at once the interpreter and the guardian of the constitution by maintaining the delicate equipoise of the Federation. The Federal Court guarantees the integrity, efficiency and the potency of the contract between the federating units. Generally speaking, the Federal Court is entrusted with other than purely constitutional questions. But so far as the present study is concerned we shall confine ourselves to examining the part that the Federal Court plays in interpreting and guarding the constitution.

*The Federal Judiciary in the United States of America* :— The Federal judicial system in the United States is completely self-contained. The highest Federal tribunal is the Supreme Court. District Courts and the circuit Courts of appeals are

the subordinate federal courts. The Federal judiciary has an independent organisation for enforcement of the decrees of the Federal Courts. According to the constitution the judicial power extends to all cases arising under the constitution, the laws of the United States and the treaties made under their authority. It also extends to controversies to which the United States is a party or controversies between two or more States or their citizens. In all cases which affect ambassadors, other public ministers and consuls and those in which a State is a party, the Supreme Court has original jurisdiction. In all other cases the Supreme Court has appellate jurisdiction, both as to law and fact, with such exceptions as are provided by the rules. The most important feature of the Federal courts in the United States lies in their action in determining the validity of the law itself. In England, no court can question the validity of any law passed by Parliament. In the United States the Federal judges assume the power not merely to interpret a given law but to decide whether the legislature in enacting it acted within the limits of the power assigned to it by the Constitution. In the exercise of this function the authority of the Supreme Court is final and it can not only set aside the provisions or laws of the States which contravene the terms of the Federal Constitution but can even declare a law passed by the Federation itself null and void if, in the opinion of the Supreme Court, it contravenes some provision of the Constitution. Thus by exercising the function of interpretation, the Supreme Court has exercised a tremendous negative influence upon the course of legislation in the United States.

*Switzerland* :— The Federalism of Switzerland is of a different type from that of the United States and the difference is most clearly reflected in their respective arrangements for the administration of justice. Unlike the Federal courts of the United States, the Swiss Federal court has no means of enforc-

ing its decisions. The duty of enforcement rests mainly upon the cantonal governments with an ultimate responsibility in the Federal Council. Moreover, the Federal Council deals with a large class of administrative questions which are excluded by the Constitution from the competence of the Federal Tribunal which is the only Federal Court in Switzerland. The Federal Court acts as a court of appeal from the cantonal courts in all cases arising under Federal law, if the amount at issue exceeds three thousand francs. The court has original jurisdiction in all suits between the Confederation and the cantons, between canton and canton, and between private citizens and the government, Federal, or cantonal. The main function of the Court is, however, the exposition of public law on constitutional questions and the determination of conflicts of jurisdiction either between canton and canton or between the Federal Government and one of the cantons. But the main distinction between the Federal Court in the United States and that in Switzerland is that while the Supreme Court in the United States acts as the interpreter and guardian of the American Constitution, no such function is assigned to or exercised by the Swiss Federal Tribunal. The Swiss Federal Court has only limited power to determine the constitutionality of law. It may pronounce cantonal laws null because of being inconsistent with Federal law ; but it must accept and apply all laws and decrees duly enacted by the Federal Assembly. The existence of the system of the referendum and the initiative which enables the people to be themselves the guardians of the Constitution has rendered the vesting of these powers in the Federal Tribunal unnecessary.

*Germany* :— In Imperial Germany, there was no Federal Court in the sense in which there is in the United States, namely as the guardian and interpreter of the Constitution. This function was performed by the Bundesrath which sat as a supreme court for the settlement of disputes between the Imperial gov-

ernment and a State or between two States when the point at issue was not a matter of private law and when a definite request for action was made by one of the parties. Finally in dispute relating to constitutional questions in States whose constitution did not designate an authority for the settlement of such differences the Bundesrath was required to effect an amicable settlement. The peculiarity to be noted about this system in Imperial Germany is that questions between States were decided by the representatives of States themselves and not referred to strangers at all. Under the Weimar Constitution, this power of adjudication of the Reichsrath, which replaces the old Bundesrath, is removed. The new Constitution establishes a supreme judicial court for deciding constitutional issues. The Constitution expressly establishes the supremacy of the laws of the Commonwealth over the laws of the States and provides that in case of difference of opinion recourse shall be had to the decision of the supreme judicial court of the Commonwealth.

*Canada* :— The judicial system in Canada is in a class by itself. While in the United States there are two distinct sets of courts, one of them belonging to the Federation and the other to the States, in Canada there is one judicial system throughout the Dominion. The whole system is controlled by the Federal Government. As the competence of the various legislative bodies in Canada is based on the relevant statute of the British Parliament, the courts can call into question the legality of laws passed by the Canadian Legislatures, Federal or Provincial. With this exception the Canadian judiciary approximates more closely to the British judicial organisation than the systems prevailing in other federal unions like those of the United States, Switzerland or Germany. The constitutional competence of the Canadian Supreme Court is practically limited by various considerations. Under the Constitution the Dominion government has the right to veto any Act pass-

ed by the Provincial legislatures. Secondly, all the residuary powers are also vested in the Dominion government. The possession of these powers reduces to a minimum the occasions when a constitutional conflict may arise. In case one occurs, the British Privy Council is usually preferred as the final arbiter on all judicial issues emerging from the constitutional Act.

*Australia* :—The judicial system in Australia differs materially from the judicial system in Canada. In Australia, the constitution provides that the judicial power of the Commonwealth shall vest in a Federal Supreme Court, called the High Court of Australia, and in such federal courts as the Commonwealth Parliament may create and in such other courts as it invests with federal jurisdiction. The High Court has exclusive original jurisdiction in cases arising out of treaties and affecting consuls and foreign State representatives. It has also an exclusive original jurisdiction in cases in which the Commonwealth is a party or cases between States or between residents of different States or between a State and a resident of another State and in all those cases in which an injunction is sought against an officer of the Commonwealth. The Constitution provides that no appeal to the British Privy Council shall lie from the decisions of the High Court in matters of constitutional conflicts between States or between a State on the one hand and the Commonwealth on the other, except in those cases in which the High Court issues a certificate to the effect that the matter is suitable for decision by the Privy Council. Thus in Australia the Federal Court is for all practical purposes the final court for the decision of all constitutional questions. Its general structure is on the American model and in its decisions also there is a tendency to follow generally the American practices and decisions.

*India* :—The Government of India Act, 1935, provides for the establishment of a Federal Court to deal with all such questions as arise in the working of a federal union. The

jurisdiction of this Federal Court is original and appellate. The Court has exclusive original jurisdiction in any dispute between the Federation and the Provinces or the Federated States or between the two latter, which involves any question of law or fact on which the existence or extent of a legal right depends. But if a State is a party, the dispute must concern the interpretation of the Act or Order in Council thereunder or the extent of the executive or legislative authority vested in the Federation by the Instrument of Accession, or arise under an agreement under part VI of the Act for the administration of a Federal law in the State or otherwise concern some matter in which the federal legislature has power to legislate for the State. In its original jurisdiction, the Court may pronounce only declaratory judgments. An appeal may be brought to the Federal Court from British India if the Provincial High Court issues a certificate that the case involves, a substantial question of law as to the interpretation of the Act. In the case of State Courts an appeal may be similarly brought to the Federal Court on the question of the interpretation of the Act or Order in Council or the extent of any authority vested in the Federation by the Instrument of Accession of the State or any subsequent arrangement. Appeal lies to the King in Council, without leave from the Federal Court, from any decision of the court in its original jurisdiction dealing with the interpretation of the Act or Order in Council. In other cases the prior leave of the Federal Court or the Privy Council is necessary. The Federal Court in India cannot acquire the status or authority of the Federal Court in the United States or even Australia because its decisions are not final and secondly the power which it gets under the Act is very limited.

*General Observations* :— A federal court is an essential attribute of federalism and every federal constitution provides for the establishment of such a court. But there is a great divergence between the powers and functions of the federal courts in

different countries. While in the United States the Supreme Court has, by virtue of the power of declaring even the Acts of the Congress unconstitutional—a power which the court itself developed by interpretation—acquired the status of the interpreter and guardian of the Constitution, no such power exists in Switzerland and much less in Germany. The Federal courts in the Federations within the British Empire are less prominent than in the United States because of the existence of the Privy Council in England. By closing the way of appeal to the Privy Council in constitutional matters except with the leave of the court itself, the Federal court in Australia has certainly much greater authority and dignity than those in Canada and India. The retention of the right of the Privy Council to hear appeals in all cases on the interpretation of the Act from the decision of the Federal Court in India seriously affects the prestige which it can acquire and betrays the distrust of the British Parliament in the Federal Judiciary although it is wholly constituted by the King in Council.

## CHAPTER VIII

## THE STATES AND THE AMENDMENT OF THE FEDERAL CONSTITUTION

*Importance of Federal Amendments* :— The success of modern government, especially in federal unions, rests upon an equitable distribution of powers between the different organs of government, as also between the different units or parts which form the whole State. The device employed to secure a proper equilibrium is generally a written constitution defining the powers and duties of each organ of government. But a written constitution would be a mockery if it could be changed in any way by one of the organs according to its own will. Limitations are usually placed by the Constitution on the powers of the Legislative organ, which is usually entrusted with some powers of either enacting or initiating amendments, by prescribing the method by which the constitution can be amended. The idea behind these restrictions is to avoid any alteration of the constitution by the ordinary operation of the legislature. In a federal union where the relations between the states on one hand and the central government on the other are of the nature of a covenant, the need for some extraordinary procedure for constitutional amendment is all the greater. The security of the respective rights and functions to be enjoyed by the federal government and the units depends upon the degree of rigidity in the constitutional law and upon the authority which is in-

vested with the powers of constitutional amendment. The security of the rights of the individuals and of States, the distribution of powers between the State and central governments, the regulation of the course of federal evolution, are all very vitally influenced by the provisions that each federal constitution provides for its own amendment.

*The United States of America* :— For the amendment of the Federal constitution of the United States of America elaborate machinery has been provided. Article 5 of the Constitution prescribes the manner in which the constitution can be amended. Briefly stated, amendments may be initiated at the instance of two-thirds of both Houses of Congress or by two-thirds of the State legislatures but they cannot become law until they have been ratified by either at least three-fourths of the State legislatures or an equal number of conventions specially summoned for the purpose in each State. The American process of amendment may, therefore, begin either in Congress which is the central legislature or in the combined will of not less than two-thirds of the individual States. Whichever be the originating source, and whether the amendments are proposed by Congress or by a special convention, the final authority lies with the majorities in the legislatures of three-fourths of the several States, that is to say, it resides in the original parties which created the American union. Not only is sufficient guarantee provided for the rights of the States by the stipulation respecting the concurrence of three-fourths of the States on any constitutional amendment, the constitution of the United States provides a further guarantee for the protection of the fundamental principle of the constitution, namely, the equality of the States representation in the Federal Senate. "No State," so runs the Constitution, "can be deprived of its equal suffrage in the Senate without its consent", a consent which would never be given unless extraordinary circumstances should prevail in the United States.

*Switzerland* :— The provisions of the constitution which govern the process of constitutional amendment in Switzerland are even more elaborate. The constitution provides that on the resolution of either House of the Federal Legislature demanding total revision or on a similar demand made by 50,000 duly qualified voters, the question of total revision of the constitution must be submitted in general terms to a referendum. An affirmative vote is followed by a general election of the two Houses for the purpose of undertaking the revision. Partial revision also can be initiated by a vote of both Houses or on the demand or initiative of 50,000 voters, the initiative being either 'general' or 'formulated'. In the former case the Federal Assembly, if it concurs with the demand, presents a draft amendment for acceptance or rejection to the people and the cantons. If it does not concur, it must present the question of revision 'aye' or 'no' to the people and then abide by their verdict. But in the 'formulated' initiative, any 50,000 voters may actually draft a specific amendment, hurl it at the head of the Legislature and compel the latter, whether it approves or disapproves, to submit the amendment unaltered to the people and the cantons. What the Federal Assembly can do, at the most, is to submit a counter project of its own ; but it cannot do anything more to guide or control public opinion. In no event can revision, total or partial, take place until the new constitution or the amendments to the old have been approved by a majority of those voting thereon and also by a majority of the cantons. The point of importance to be noted from the point of view of our study is that although the Swiss constitution leaves the sovereign powers in the hands of the people, it does recognise the independent existence of the cantons, as entities distinct from the people, in requiring the consent of the majority of the cantons for any constitutional amendments.

*Germany* :— The procedure for constitutional amendment in Imperial Germany was simpler than that in the United States

or Switzerland. Amendments to the constitution were not submitted either to the people or to the government of the States nor were they passed by any special or peculiar procedure. They were originated and acted upon as ordinary laws would be. There were only two limiting provisions. Firstly any amendment could be defeated by fourteen negative votes in the Bundesrath and secondly no State could be deprived of any right guaranteed to it by the constitution, without its own consent. The significance of the first provision can be appreciated only if it be remembered that Prussia in its own right possessed seventeen out of fifty-eight votes in the Bundesrath. Similarly any amendment could be defeated by a coalition of single-member States or by concert among the middle States. The second proviso afforded a considerable measure of security to the smaller States. This practical flexibility of the constitution was not out of harmony either with the spirit of the German polity or with the historical origins of the Empire. In the first place, the absence of any provision for reference of proposed amendments to the people as in Switzerland, can be understood when one remembers that the Federation of Germany was a federation of Princes and free cities. The individual citizen had no *locus standi* in constitutional matters. Secondly, the reference of the proposals to the governments of the states, as is done in Switzerland or the U.S.A. was obviously unnecessary in view of the fact that the Bundesrath represented the Governments of the States themselves and that no less than the concurrence of three-fourths of the members of the Bundesrath was essential for the carrying out of any constitutional provision. The change can be distinctly noticed when we consider the provisions of the Weimar or the Republican Constitution. Section 76 of that Constitution ordains that the Constitution may be legislatively amended, that is, presumably by the ordinary legislative ...dure. Such amendments, initiated by the Reichstag, are ...id only if two-thirds of the accredited members are present

and at least two-thirds of those present record their votes. In the Reichsrath, which like the old Bundesrath represents the States or Länder, a majority of two-thirds of the recorded votes is necessary. But the Reichsrath possesses a suspensive veto. If, however, the Reichstag insists upon the proposed amendment, the Reichsrath may within two weeks of the passing of the measure demand that it shall be submitted to a plebiscite; but it cannot be negatived unless a majority of voters record their votes. The transfer of the ultimate power over the amendments of the Constitution from the Bundesrath to the Reichstag or the people is significant of the balance of power which has decisively shifted from the body which represented the States to the body which directly represents the people.

*Canada* :— As has been already observed, the Dominion of Canada possesses a constitution which is much less perfect than the typical federal constitutions of the United States or Switzerland. The British North America Act provides no machinery for its own amendments and can, like any other Act of the Imperial Parliament, be repealed or amended by the Imperial Parliament alone. Technically, therefore, the process of constitutional amendment belongs not to Canada but to Great Britain. There is, however, no difficulty in having an amendment made if and when demanded. "An address to the Sovereign is passed by both Houses of Parliament at Ottawa asking for the amendment specified....when the address is received by the Colonial Secretary in London, the desired amendment is passed by the Imperial Parliament as of course and without debate. This is, in substance, simply giving legal validity to an amendment agreed upon by the parties to the original contract which they desire to amend". (WHYTE—*India—A Federation?* p. 271).

*Australia* :— The Commonwealth of Australia is not behind Switzerland or the United States in the precautions it has taken in regard to changes in the Constitution. Under

the Australian Commonwealth Act every proposed amendment of the Constitution must in the first instance pass both Houses of the Federal Legislature; failing this, it must pass one of the two Houses twice, with an interval of not less than three months intervening. It must then be submitted to the electorate by means of a referendum and in order to become law, must be approved by a majority of votes in the Commonwealth as a whole and by a majority of votes in each State. The constitution further provides that "no alteration diminishing the proportionate representation of any State in either House of Parliament or the minimum number of representatives of a State in the House of Representatives or increasing, diminishing or otherwise altering the limits of the State or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law" (Article 120). The Australian Constitution, therefore, has taken precaution not only to maintain the distinct equality of the States but also their integrity in tact. It is true that the prior assent of the Crown in England is necessary for any measure to come into operation, but the refusal of the Crown in such an event is either unthinkable or only thinkable in such circumstances as must mean the secession of Australia from the British Empire.

*India* :—The Government of India Act, 1935, follows the model of the British North America Act and makes no provision for its amendment. The Act can be amended by the British Parliament and neither the Federal Legislature nor any Provincial Legislature has power to amend any part of the Act. Even in minor matters the Act authorizes amendments, not by the Federal Legislature, but by Order in Council with the assent of Parliament and even for the proposal of the amendments a very elaborate process of addresses to be passed by the Legislature is provided. It is further provided that even in such minor matters no proposal can be made before the expiry of ten years

from the establishment of the Federation. Thus while the absence of any provision for constitutional amendment in Canada is merely formal, leaving practically the full right to the Canadian Legislature, that in India is real and leaves no scope to the Federal Legislature even to propose any amendment of importance.

*General Observations* :— Federal Constituitions represent, as we have seen, a compact or covenant between states, formerly in a position of virtual if not complete independence. Under such circumstances there can be no question of entrusting unlimited powers to the Federal Legislature. Our study reveals that every constitution prescribes some method for amendment other than the ordinary process of Federal legislation. There are certain peculiarities which deserve notice. In the first place, a specific or implied consent of the ultimate sovereign of the state is required for any material change in the constitution. For example, Switzerland requires that every constitutional amendment must be approved by the people. In the United States the final approval rests with three-fourths of the State legislatures which are fully representative of the people and the consent of which means the implied consent of the people. The constitutions of Republican Germany and Australia leave the power of amendment to the Federal Legislature, subject to certain conditions. But in case the Federal Legislature is not able to pass the amendment according to the procedure, it is referred to the people. In other words where the Federal Legislature is unable to express the will of the people as required by the constitution, the will of the sovereign people is ascertained by a direct reference. The ultimate sovereign, in Canada formally, and in India really, is the British Parliament and hence the power of constitutional amendment rests in that body. Only in the case of Imperial Germany, the ultimate sovereignty rested in the Princes and the free cities that formed the Empire and hence the provision for the veto

of any constitutional amendment by fourteen negative votes in the Bundesrath. The second peculiarity is that the constitutions of the United States, Switzerland and Australia require the specific assent not merely of the people but of the States or units as such, thus indicating that the Federal unions are not the results of the union of the people of the States merely but of the States as entities distinct from the people composing them. No such recognition of the independent existence of the States so far as amendments are concerned is found in the constitutions of Republican Germany or Canada because in effect both are less federal than normal federations. A further peculiarity which we can notice in the case of the Federations within the British Empire is the insistence of the Imperial Parliament on maintaining the final authority over all amendments of the Acts by which it granted the constitutions, although in actual practice the authority is almost nominal in the case of Australia and Canada. But it is real in the case of India. India presents a peculiar problem by the presence of British Indian Provinces and a large number of Indian States. The Imperial Parliament has solved the problem, at least for the present, by withholding the power of constitutional amendment from the Federal legislature or the people altogether and by making itself the sole judge of the necessity of future amendments.

# CHAPTER IX

## SOME GENERAL OBSERVATIONS

*Introduction* :— We have, in the preceding chapters, discussed the general or broad principles of Federalism and also their application in different federal unions. In this chapter we propose to discuss certain notions which are considered as essential in a Federal union or which are generally misunderstood or sometimes over-emphasized in the exposition of the federal polity. We have seen that a federation is the result usually of a voluntary coalescing of a number of sovereign and independent states for the discharge of certain functions of general or national importance while retaining to themselves complete control of other matters. Keeping this conception of a federal union in mind we now proceed to consider certain other general conceptions concerning federal unions.

*Sovereignty of Units in a Federation* :— The first question we discuss is whether the units or States in a federal union are sovereign. It is contended by some political thinkers that by joining the Federation, the State parts with its sovereignty and that sovereignty resides in the Federation and not in the units. This idea is based upon the conception that sovereignty is indivisible. On the other hand there are other writers who say that the State formed by the union of the parts is sovereign in respect to those matters which by the constitution are com-

mitted to its care while the component members are equally sovereign with respect to those matters which are left to them. In other words, each is sovereign within its constitutional sphere. Looking to the manner in which a federal union is generally formed, one is inclined to agree to the second view because when entering the union a State has its powers and liabilities defined by the constitution or contract forming the union and both the State and the Federal government are bound by the terms of the contract. If we assume that the unit is not sovereign because it has lost certain powers we must correspondingly assume that the Federation is also not sovereign because it does not possess all power over the whole union. The sound criterion appears to be that of asking whether the federation or the unit possesses supreme power over the affairs or functions left to it by the constitution. If it does it is sovereign to that extent. In fact, it is this quality which distinguishes the unit in a federation from the division or district in a unitary state. It is on this principle that the Indian States are considered as sovereign States so far as internal affairs are concerned, although for external affairs they are under the control of the British Government. The Swiss Constitution expressly says that the Cantons are sovereign so far as their sovereignty is not limited by the Federal Constitution and as such they exercise all the rights not delegated to the Federal Government. Similarly in the United States, the States are considered to be sovereign in all matters which are not expressly delegated to the Federation. This is the view that has been uniformly maintained by the United States Supreme Court. In its decision in the License Case, the Supreme Court declared that "the general government and those of the States were separate and distinct sovereignties, each acting separately and independently on the other within their respective spheres". Considered in the light of the above reasoning, one is drawn to the conclusion that States even in joining a federal union can retain their sovereignty except in

matters over which they have voluntarily accepted to forego it.

*Is a Federal Union Indissoluble?* :— A federal union is generally considered as indissoluble or permanent. Once a state enters the union, it is perpetually merged into it and has no right to get out of it. This view gained strength from the result of the civil war in America in which the efforts of the Southern States to escape from the union proved unsuccessful. But this question must be viewed in its legal aspect. Legally whether a state can secede from a federal union or not depends upon the terms of the covenant or constitution under which the state in question enters the federation. The constitution is something like a contract, and so long as the terms of the contract are being followed by the parties, no one of them has the right to repudiate it. If the contract between private parties is enforced by municipal courts supported by the strength of the government, contracts between the units of a federation can be enforced by the Federal Court supported by the strength of the Federal Union. Normally a federation is indissoluble because the constitution contains the means for its amendment and a state which enters the union under the terms of the constitution cannot back out so long as the provisions of the constitution are strictly followed. But the case is different where States enter under certain restrictions or conditions as some of the States in Imperial Germany did or States in India will do. In the latter case if an attempt is made to alter the conditions which formed part of the original contract the party affected has the legal right to repudiate the contract altogether or in other words to secede from the Federation. Secondly, there can be nothing like an absolutely indissoluable federal union comparable with an insoluble chemical. The federal union is the result of certain advantages which a strong union offers to separate states. Supposing those advantages do not remain or do not remain to the extent necessary for maintaining the union, there is no reason why the federation

should not dissolve. Taking a hypothetical case, supposing all or most of the States in the United States decide that the Federation should be dissolved, there is obviously no power that can prohibit the dissolution. Once a federation is formed it is usually never dissolved because of the inherent advantages of the system; but there need not be and cannot be an absolute bar to dissolution in spite of change of circumstances or obvious disadvantages of maintaining the union.

*Federal Citizenship—Is it Necessary?* :— The other idea which is commonly associated with a federal union is that of a federal citizenship. It is said that in a Federation, there is a double citizenship, federal and state or provincial. Or, in a negative direction, the federal government acts not only upon the associated States but also directly upon their citizens. Looking to the instance of the United States or Switzerland we find this idea embodied in their constitutions. But the question is: "is it a necessary ingredient of the federal form?" If we consider the idea of the formation of the federation as a union of independent states for certain common purposes, there does not appear to be any reason why the new government should have anything to do with people of the States directly. In federations the units of which are all republican this direct contact of the federal government with the people is not very objectionable since the people are the ultimate sovereign, whether in particular cases they pay obedience to the state authorities and in others to the federal ones. But in federations the units of which are not all republican, like the federations of Imperial Germany or India, if the federal government is allowed to have direct contact with the people of the states, the result will be the creation of divided allegiance of the people and a diminution in their respect for the government of their own state. This means that federal citizenship is not only not desirable in federations, the units of which are monarchical, but it is positively dangerous to the ultimate stability of the monarchical

form itself. Whether this is in itself desirable or not is a different question but certainly that is never intended when the state agrees to join the Federation nor would a state join it if it anticipated these results. The general centripetal tendency which is visible in all federal unions is due to a large extent to this direct contact between the central government and the people. It was this consideration that led most of the States in India to object to the imposition of any direct tax by the Federal Government upon their subjects. Theoretically there is nothing in the federal form of government which necessitates a direct contact between the Federation and the people in the states or, in other words, which requires a federal citizenship.

*Should the Units of a Federal Union have any Particular Form of Government?*—It is contended by certain writers that the units of a federal union must conform to a common form of government, that is to say, their governments should be practically uniform. This view gains support from the fact that the constitutions of the United States of America and Switzerland expressly lay down that the units must maintain the republican form of government. The Constitution of Australia also stipulates that the form of government of each State as at the formation of the Union shall be maintained and since all the States were republican, it is evident that the Australian constitution requires that the republican form should be retained. The Constitution of Republican Germany goes further and enjoins upon the units not only to maintain the republican form but to have parliamentary governments. A careful consideration of the above facts makes it clear that the inclusion of these conditions was the result more of the anxiety of the framers of the different constitutions to maintain the democratic form of government than of the inherent necessity of uniformity of governmental forms as an essential ingredient of a federal union. On the other hand there were

instances of federal unions the units of which were of diverse types, the most typical illustration being that of Imperial Germany. The German Empire was a federation of "four kingdoms, six grand duchies, five duchies, seven principalities, three free cities and the Imperial domain of Alsace-Lorraine". (WILSON—*The State*, p. 466), or as described by Lowell, it was a compact between a 'a lion, half a dozen foxes and a score of mice' (*Governments and Parties in Continental Europe*, Vol. I. p. 246). Even in Switzerland, under the general category of republican governments, there are cantons some of which are organised on the representative principle while others are pure democracies. The federal union of the United States is composed partly of republics called States and partly of dependencies called 'territories'. From the pure theoretical aspect, there does not appear to exist any reason why the internal form of a state should come into question at all in the formation of a federal union. In fact, the very essence of this type of union is that it enables different types of states with diverse religious, cultural or political differences to combine together for certain common purposes. To insist upon a common mould of government for all such units is a direct contradiction of the main theme of the union. On the other hand, there is no reason to believe that the diversity of political organisation will affect the strength of the central government. As long as the entire resources of the community are at the disposal of the federal government in times of crises, no weakness can result from the nature of the internal political organisation of the constituent bodies. In India, for example, it may be that while in British India quick and decisive action may be impossible owing to party or parliamentary conventions, in States governed under the monarchical form such a difficulty may not arise. To that extent the diversity of forms may be a source of strength to the body politic rather than of weakness. This point was admirably explained in a different way

by H. H. the Maharaja of Baroda at the Round Table Conference. "We shall have, in other words, unity without uniformity, a prime requisite of true federation....It is my deliberate conviction that to strain after uniformity in the federal structure would be a mistaken policy. There should be perfect freedom given to each unit to develop along its own peculiar lines. Healthy and friendly rivalry is beneficial to the state as to the individual. Thus alone, hitherto have many fruitful ideas been fostered in Indian States". (*Proceedings of the First R. T. C.*, p. 489).

*Should a Representative in the Legislature be Instructed?* —This is a general question with regard to representatives in any legislative body and not specifically a federal legislature. The usual practice is to leave the representative use his unfettered discretion in all questions on which he is required to give his opinion, and the reason of it is obvious. The electorate in most countries is so big and distributed over such a wide area that it is insuperably difficult, if not impossible, to ascertain exactly the combined view of such an electorate. Its duty is, therefore, to elect a competent man to represent it and then rely on his best judgment in each case. There are two obvious cases in which the representative is generally left free to use his own judgment. Firstly, as already stated, when the electorate, either by its size or the extent of the area covered by it, is not in a position to express its will, and secondly by the devices of referendum and initiative it is in a position to countermand any wrong judgment of its representative. But the case is certainly different where the electorate sending the representative is a corporate body and as such is capable of expressing its will or, in other words, is competent to give a mandate to its representative. In this case it is quite reasonable that the representative should represent the views of the body sending him and not his own views. The necessity of this principle becomes the greater in

proportion to the importance of the body to which the representative is sent. For example, representatives of nations at an international gathering like the meetings of the League of Nations are necessarily deputed to voice the sentiments of their respective nations and not to advocate their personal opinions. The same analogy can be carried to a federal legislature in which one house is believed to represent the states as such. Since the states are in a position to express their will, there is every justification for imposing upon their representatives the duty of following the directions of the states. This principle we find embodied in the constitution of Germany—Imperial as well as Republican.

# PART TWO

# THE INDIAN STATES IN THE FEDERATION OF INDIA

# CHAPTER I

## HISTORICAL EVOLUTION OF THE RELATIONSHIP BETWEEN THE INDIAN STATES AND BRITISH INDIA

"Politically there are two Indias, British India governed by the Crown according to the Statutes of Parliament and enactments of the Indian Legislature, and the Indian States under the suzerainty of the Crown and still for the most part under the personal rule of their Princes. Geographically, India is one and indivisible made up of the pink and the yellow. The problem of statesmanship is to hold the two together". (*The Indian States Committee*, 1928).

*Introduction.*—Historically, geographically and ethnologically, the Indian States are a part and parcel of India. Judged by any of the standards of religion, culture, language and historical traditions, the Indian States and British India form one nation. Its division into two distinct political systems of organisation is the result of an accident of history due to the emergence of the British power in India. Even before the advent of the British power in the arena of Indian politics, there had been several invaders and conquerors in the long and chequered history of the country but they either contented themselves with the spoils and returned to their country or, like the Moghuls, settled in the country completely identifying themselves with the people. The British power, on the contrary,

while it enjoyed the spoils of war and established itself as a dominant power, has maintained its distinct identity and aloofness and has divided the country into two water-tight political compartments. As a result there are two distinct political systems in India, one for British India under the direct control of Parliament and the other under the traditional rule of the Indian Princes under the suzerainty of the British Crown. The development of science, trade and means of communication are bringing the nations of the world into a closer contact all the time ; these forces are powerfully working towards the unification of the whole Indian nation and must inevitably bring about a closer political union there also. The Government of India Act, 1935, is an attempt to bring together these two divergent systems of political organisation into one common mould of the Federation of India. For the proper understanding and appreciation of the role which the Indian States must play in this experiment, it is essential to study the history of the relationship between the States and the British power and the various reasons which induced them to throw in their lot with British India by agreeing to join a scheme for the Federation of India.

*Early Relations with the East India Company.*—A trading company called the East India Company was started in England in the beginning of the seventeenth century under a charter from Queen Elizabeth. The history of its life in India has thus been described by the authors of the Imperial Gazetteer. "The history of British India falls into three periods. From the beginning of the seventeenth century to the middle of the eighteenth century, the East India Company is a trading corporation existing on the sufferance of Native Powers and in rivarly with the merchant companies of Holland and France. During the next century the Company acquires and consolidates its dominion, shares its sovereignty in increasing proportion with the Crown, and gradually loses its

mercantile privileges and functions. After the mutiny of 1857, the remaining privileges of the Company are transferred to the Crown, and then follows an era of peace in which India awakens to new life and progress". (*Imperial Gazetteer*, Vol. IV, p. 5). The British people thus entered India for business, appearing before the Indian Rulers as petitioners for privileges of trade and concessions over their rivals in other countries. But this position gradually changed on the disruption of the great Moghul Empire and in the chaos that followed the weakening of the central power, the British took advantage of the internecine struggle between different Indian chiefs. The East India Company in this period began to enter into treaties with independent princes but these treaties were still those of equality. The relationship between the East India Company and the Indian Princes was based on these treaties, which were interpreted according to the general principles of International law. (Nabob of the Carnatic Vs. the East India Company 1792, 2 Ves. 60). By the beginning of the nineteenth century, however, the superior attitude of the Company began to be visible. This attitude is reflected in the treaties of subsidiary alliance concluded by Lord Wellesley. In fact, by this system of subsidiary alliance, Wellesley laid the foundations of the present protected States of India. By requiring them to maintain at their own cost a considerable British army, ostensibly to protect them in their perennial dynastic quarrels, possibly to keep them in check against any design that they may be misled to entertain against the company, by compelling them to surrender all control over their foreign relations, by stipulating that they should entertain no Europeans in their service without the consent of the Company's Government, by inducing them to agree to the arbitration of the Company in all their differences with the friends of the Company, Wellesley managed to render them entirely innocuous for any future opposition.

The wordings of the treaties of this period, however, suggest that they were entered into by two equal powers.

*Policy of Subordinate Isolation* :—The policy of Wellesley was pushed forward vigorously by Lord Hastings, who, while negotiating treaties with the Indian States, claimed the right of interference in the internal affairs of the States on the score of misrule. The direct extension of British territory which this Governor-General was instrumental in bringing about was overtly due to the same idea of securing a modicum of good government to the people of these States. This policy was also pursued later on, by Lord William Bentick who annexed Coorg on the ground of incompetency of the Ruler to improve his administration. In the treaties of this period we see the gradual transformation of the basis of equality to that of subordination. Instead of encouraging healthy combination, they imposed isolation ; instead of aggregation, they conduced to the segregation of the States. Any relations between the States were looked upon with suspicion which still colours the whole system of political pratice of the British Government with relation to the States.

*The Policy of Annexation and the Mutiny of* 1857 :— In the twenty years that followed the departure of Lord William Bentick from India, the policy of the Company's government fluctuated between that of absolute non-intervention and one of annexation according to their convenience. But under Lord Dalhousie the policy of non-intervention was abandoned and the important States of the Punjab and those of Nagpur, Oudh and Sind were all annexed for one reason or another. There is no doubt that some of these annexations were brought about for purposes of imperial defence or internal consolidation. This aggressive policy of Lord Dalhousie occasioned a natural alarm among the States who had accepted British protection and who apprehended that the supreme power had abandoned the role of King Log and had commenced to play the part of

King Stork. The Mutiny of 1857 which followed the departure of Lord Dalhousie has been regarded by many as the direct result of the injudicious and unjustifiable annexations made by him. The Mutiny was the concurrent action of the last vestiges of the old powerful kingdoms who had never acknowledged the supremacy of the British Government and who paid the price of their patriotism by total extinction. On the other hand those of the States generally who had accepted British protection remained loyal. In the words of Lord Canning, who was then the Governor-General, "the Crown had seen a few patches of Native government prove break-waters to the storm which would otherwise have swept over us in one great wave." (Quoted in EDDY AND LAWTON—*India's New Constitution*, p. 17).

*The Crown and the Announcement of Policy towards the States* :— The British power came out triumphant in the Mutiny but this event saw the end of the East India Company as a political power. The government of India was transferred to the Crown, to be administered by a minister responsible to Parliament. In recognition of the signal services rendered by the States in the Mutiny, the Queen in her famous Proclamation of 1858, gave an assurance to the Princes in regard to the strict observance of the treaties. "We hereby announce to the Native Princes of India that all Treaties and Engagements made with them by or under the authority of the Honourable East India Company, are by us accepted and will be scrupulously observed, and We look for the like observance on their part. We desire no extension of Our present territorial Possessions : and while We permit no aggression upon Our Dominions or Our rights to be attempted with impunity, We shall sanction no encroachments on those of others. We shall respect the rights, dignity and honour of Native Princes as Our own". The Proclamation announced the abandonment of the policy of annexation and guaranteed the protection of

the rights of the States in accordance with the treaties by accepting them as binding upon the Crown.

*General Policy of the British Government after 1858* :— The general principles which guided the policy of the Crown towards the Indian States after 1858 may be briefly stated. The Crown began to demand a fuller and greater control than had been exercised by the East India Company. The foreign relations of the States were entirely in British hands with the result that it was in the power of the British Government to include the States in treaties affecting India. A declaration of war by the United Kingdom involved the States in war and a declaration of neutrality or peace affected the States likewise. In internal matters the States were required to grant many concessions to the Government of India as in matters of construction of railways, establishment of post, telegraphs, etc. Moreover the British Government assumed the right to control succession, interpose its authority during the minority of the Ruler, and above all, the right to depose a ruler whose misgovernment was notorious. Since there was no judicial authority to determine the points in dispute between the States and the British power the latter had to play the double role of the prosecutor and judge in the same cause. The most astounding right claimed by the British Government was that of deposing a ruler on the ground of misgovernment although that right does not exist under the treaties. In order to illustrate how such interference was practised, we refer to two important cases of deposition.

*Cases of Deposition of Indian Rulers* :— (*a*) *Maharaja Malharrao Gaekwad of Baroda.* The first important case is the deposition of the Maharaja Malharrao Gaekwad of Baroda in 1875. The relations between the Maharaja and the British Resident were, for various reasons, far from satisfactory. The Resident often tried to interfere in the internal administration of the State which Malharrao stoutly opposed. The culminating

point was reached when the Resident complained to the Government of India that an attempt had been made at the instigation of the Maharaja to poison him. This resulted in the appointment of a commission of inquiry in spite of the protest of the Maharaja that it was unwarranted by the terms of the treaties between the State and the British Government. In reply, the Governor-General, Lord Northbrook, defended interference by saying 'My friend, I cannot consent to employ British troops to protect anyone in a course of wrong-doing. Misrule on the part of a government which is upheld by the British power is misrule in the responsibility for which the British Government becomes in a measure involved. It becomes, therefore, not only the right but the positive duty of the British Government to see that the administration of a state in such a condition is reformed and that gross abuses are removed..... Such timely intervention, indeed, to prevent misgovernment culminating in the ruin of the State is no less an act of friendship to the Gaekwad himself than a duty to his subject". (EDDY AND LAWTON—*India's New Constitution*, p. 19). The Commission was appointed, the charge of instigating the attempt to poison the Resident was not proved and yet the Government of India deposed Malharrao on grounds of misgovernment, thus performing the great act of friendship to the Gaekwad !

(*b*) *The Maharaja Rana Zalim Singh of Jhalawar.* Our second instance of deposition is even more illuminating than the first as it brings out clearly how the Government of India respect the treaties and interpret the solemn pronouncements of the Crown. It is that of the deposition of the Maharaja Rana of Jhalawar in 1897 for failure to observe his obligations to the British Government. The episode has been graphically narrated by Pandit Shyam Shanker, late Foreign Minister of Jhalawar, thus : 'The last incident in his career in Jhalawar deserves mention to illustrate a plot. When in 1896, the Agent

to the Governor-General visited Jhalarapatan, the Capital, with an army stationed near it, to give him the final warning, a spy came to inform the Prince that arrangements had been made to arrest and take him in custody to be deported, when he would go to the Agency bungalow to see the Agent to the Governor-General. The Prince took care to arm himself with a loaded revolver for self-defence and ordered his army to remain ready. On the other hand, a spy informed the Political Agent that the Prince was coming with a loaded revolver to shoot the Agent to the Governor-General and his army was ordered to stay ready. In the midst of a heated conversation, the officer was warned by a slip of paper of the alleged intention to shoot him. The conversation was abruptly ended and the loaded revolver was dexterously taken out of Zalim Singh's pocket. So there was the proof of an attempt to assassinate the representative of the Viceroy! The charge was, however, dropped; but the feeling caused by it worked and accounted for the vindictive action of treating the State as 'lapsed.' Maladministration was laid at the victim's door (although he left the State treasury full and his subjects crying and praying for his return). In defence of its actions, the Government of India said (in 1911) "There can be no question that the Ex-Maharaj Rana Zalim Singh's misconduct which led to his deposition after repeated warnings amounted to violation of his obligations to the British Government." (*The Nature and Evolution of the Political Relations between the Indian States and the British Imperial Government* p. 103).

*Strange Interpretation of the Queen's Proclamation* :—A very interesting and instructive document relating to the Jhalawar case has been published by Pandit Shyam Shanker. It is a letter written by the Governor-General in 1912 in reply to the representation of the ex-Maharaja Rana of Jhalawar. But for its secrecy this letter would have opened the eyes of the Rulers of Indian States to the realities of the situation long

before the publication of the famous letter of Lord Reading to H.E.H. the Nizam in 1926 and which was later on endorsed and sanctified by the Butler Committee. An extract is given below :

"All that is guaranteed by the pledge of the Sanad which is a most important one, is that if an adoption is made by a chief, it will be recognised by the Government. No more, no less".

"The policy of His Majesty's Government in cases such as occurred in Jhalawar in 1897 was clearly explained in a dispatch from His Majesty's Secretary of State, dated the 29th September 1875, the purport of which it is desirable to restate. It is based on the Proclamation of Her Majesty Queen Victoria of 1858, to the Princes, Chiefs and people of India to the effect that 'We desire no extension of our present territorial possessions' and from this policy it has passed into a political axiom that any further expansion of the direct jurisdiction of British Government by the application of the doctrine is highly inexpedient.....It aims at the perpetuation of Native rule which is something wider than the perpetuity of the houses of Native Rulers, is based on grounds of general policy and not an exclusive regard for their individual claims and is capable of exceptions under the pressure of an adequate exigency. In short it is a policy and not a pledge."

"As the State has lapsed, there was only one party concerned in its future administration, the British Government."

"'I am to say in the first instance that the British Government are in no way bound by precedents". (*Nature and Evolution of the Political Relations between the Indian States and the British Imperial Government,* p. 128).

The last sentence from the reply of the Viceroy, namely 'the British Government are in no way bound by precedents,' deserves the special attention of those jurists who try to base

the claims of the States on the strength of the decisions of the Government of India.

*Change of Policy towards States in the Twentieth Century*: The dawn of the present century witnessed a tremendous national awakening in India and with the growing strength of the new spirit, the balance of faith of the Government began to shift from the people in British India to the Rulers of the States. Throughout the last century, the States had been looked upon with suspicion, their relations among themselves or with British India were scrupulously guarded and they were kept completely and artificially in isolation from the rest of the world. But with the growing strength of political agitation and the growing discontent among the people in British India, the British Government realised that the consolidation of the States was essential to maintain the solidarity of the Indian Empire. "The British Government has many distinct advantages in its preservation. The States bear an appreciable portion of the cost of the defence of the Indian Empire and provide a sort of an indefinite but yet a reliable reserve to be drawn upon in cases of emergency. And people are not wanting who allege that there is a deep-seated reason, a more subtle influence, requiring the British Government to tolerate and even to actively support the Native States. The Native States provide an admirable foil by their relatively backward system of government to set off to advantage the British form of government". (K. T. SHAH—*Governance of India*, p. 380). From the beginning of the twentieth century, therefore, we can notice a distinct change in the policy of the British Government towards the States.

*The Great War and the Princes* :— The Great War in 1914 accelerated the change which was becoming visible in the beginning of this century. The prolonged duration and the heavy cost of the war necessitated the intensification of the war effort in India and the active co-operation of the Princes became absolutely necessary to secure adequate supplies of men

and money. At no other time was the loyalty of the Princes to the British Throne more demonstrated than during the war when all the Princes placed their full resources at the disposal of the Imperial Government. The policy of isolation, which had been hitherto followed, was obviously impossible in these circumstances and had to be abandoned. For the first time in the history of India, the representatives of the Princes sat with representatives from British India, at the War Conference at Delhi in 1917. The war thus served to remove the suspicion, to a certain extent, with which the British Power looked upon the Princes and to relax the system of isolation which had so long been imposed with rigid conditions. Events which followed the war showed how the Government recognised the independent position of the Princes. H.H. the Maharaja of Bikaner was invited to the Imperial War Council and to the Peace Conference at Versailles where he signed the Peace Treaty as a pleni-potentiary representative of the Indian States. The signatory on behalf of British India was the Secretary of State for India. Since then the States have been regularly represented at Imperial gatherings like the Imperial Conferences or at International meetings like those of the League of Nations. In 1930, H.H. the Maharaja of Bikaner actually led the Indian delegation to the League. Thus it was that the War helped to demolish the walls of isolation and the Princess were placed in relationship not only with members of their own order but with Imperial and International bodies as having some distinct status. This novel relation, so established, is a paradox, when considered along with the theory of the supremacy of the British Government. Its real nature cannot be determined by any existing canons of international law or political science.

*Establishment of the Chamber of Princes* :— Before the war, the States were segregated from each other and each cared only for its immediate needs. By their closer co-operation during the war and the general awakening which the war brought

about in the world, the Princes realised the necessity of some co-operative or collective effort for the recognition and maintenance of their rights which were gradually disappearing. The British Government, on their part, also welcomed the idea of the formation of a body of Princes as it would give them an easy approach to the Princes and make their will felt more than when spread over six hundred odd States. Thus in 1921, the Chamber of Princes was established with the Viceroy to preside over its deliberations. The presence of the Viceroy, however, in the Chamber destroyed its independent character and it became merely a deliberative and consultative body. Its establishment, however, marked a change of far-reaching importance in the relations of the States and by bringing them into closer contact, the Chamber unconsciously sowed the seeds of the future federation of India.

*Events leading to the Appointment of the Butler Committee* :— The growth of political agitation in India, the policy of the gradual development of responsible government, announced by the British Government in their famous declaration of August 17, 1917, and the subsequent introduction of the dyarchical form of government under the Montague-Chelmsford reforms, led the Princes to think about their own future in the political structure of India. Secondly the States had no share in formulating or influencing the tariff policy of the Government of India although it affected them equally with the rest of the country. The greatest event, however, which brought to the forefront the necessity of a clear definition of the relationship between the States and the British Government, was the publication of Lord Reading's letter to H. E. H. the Nizam of Hyderabad in 1926. H.E.H. the Nizam had been agitating the question of the retrocession of the Berars for a number of years on the strength of his treaties and engagements. Lord Reading, who was then the Viceroy, rejected the demands of the Nizam and emphatically stated " The Sovereignty of the British

Crown is supreme in India and no Ruler of any Indian State can justifiably claim to negotiate with the British Government on an equal footing. ' Its supremacy is not based only upon treaties and engagments, but exists independently of them, and quite apart from its prerogative in matters relating to foreign powers and policies; it is the right and duty of the British Government, whilst scrupulously respecting all treaties and engagements with Indian States, to preserve peace and good order throughout India". (Annexture to the Report of the Indian States Committee 1928). As if to add insult to injury, Lord Reading also stated : " I will merely add that the title 'Faithful Ally' which Your Exalted Highness enjoys has not the effect of putting your government in a category separate from that of other States under the paramountcy of the Crown." (Paragraph 5). This cold-blooded reply to the greatest of the Indian Princes alarmed the whole Princely order and they demanded an examination of their rights and privileges. The Indian States Committee, generally known as the Butler Committee, was then appointed.

*The Butler Committee and the Theory of Paramountcy*: The Butler Committee upheld the views of Lord Reading but it could not, perhaps would not, define the term 'Paramountcy.' The Committee simply stated : " Conditions alter rapidly in a changing world. Paramountcy must remain paramount. It must fulfil its obligations defining or adapting itself according to the shifting necessities of the time and the progressive development of the States....On Paramountcy alone can the States rely for their preservation in the generations that are to come. Through Paramountcy is pushed aside the danger of destruction or annexation ". Thus the Butler Committee strengthened the claims of the Government of India by giving their policy the stamp of recognition by legal experts. The Committee, while expounding their Paramountcy theory, emphasised that the relationship between the States and the Paramount Power

was based not only on treaties but on the established facts as they have evolved or in other words, "treaties, engagements and sanads, supplemented by usage and sufferance and by decisions of the Government of India and the Secretary of State, embodied in political practice". Interferences and interventions in express violation of the treaty rights were justified by the Committee on such 'moral' grounds as 'for the benefit of the Prince', 'for the benefit of the State', 'for settlement and pacification', and 'for benefit of India'. The glaring inconsistency in the arguments of the Committee lay in the fact that while it gave prominence to political and moral considerations which, in practice, had overridden the legal obligations of the treaties, it would not expressly maintain that political considerations can so override treaty obligations, nor did it assert in clear terms that the treaties had been partially or wholly abrogated, rescinded or submerged under the accretions of practice. On the contrary, it asserted a scrupulous respect for all treaties and engagements with the Indian States side by side with a justification for their violation. The usage, sufferance and practice of the Political Department are only legal terms applied to legalise what was assumed, asserted or demanded by the Government of India, taking advantage of its superior position in which it found itself in the process of history.

*What induced the Princes to join the Round Table Conference* :— The Butler Committee left the Princes completely in the dark as to the exact nature of their relationship. On the contrary, it brought home to most of them the utter futility of their 'solemn' treaties when imperial interest clashed with their observance. There was another reason also which the Princes had to attend to and that was the emergence of the youth movement, the radical element in which longed for the abolition of the whole Princely order as an impediment in the Nation's progress. "To the Indian Nationalist also the presence of the Native States as so many relics of a deplorable

past is unsupportable. Impotent to do any good, incapable of assimilating modern ideas of good government, constitutionally averse to all ideas of progress, the Native States cannot but appear to the impatient nationalist as so many hindrances in the way of India's regeneration. He is but too apt to forget that the Native States offer, in the existing circumstances of the country, about the only chance for displaying administrative talent or genius to the inhabitants of India. He also forgets that the Native States are the only section of the Indian community who can, if they would, promote materially the regeneration of India. He thinks but of the few but fascinating examples of royal license and recklessness; he remembers their misrule in the past, broods upon their apparent absolutism in the present, and hastens to dub them from such evidence as entirely unsympathetic with the hopes and aspirations of the rising generations of India. Curiously therefore, if at this time there are any advocates of mediatisation or even total annexation of the Native States, they are to be found in the ranks of the young and ardent nationalists." (K. T. SHAH—*Governance of India*, p. 382). Thus left in despair by the Butler Committee on the one hand and the existence of the radical revolutionary on the other, the Princes readily accepted the offer to join the Round Table Conference as it once again raised the hope of a clearer and better solution of the grave problems which confronted them and it was this very hope that induced them to espouse the cause of the federation. The considerations which led the Indian Princes to participate in the Round Table Conference were admirably described by Sir Manubhai Mehta who is an outstanding politician in the Indian States.

"First and foremost their action has been determined by their loyal attachment to the person and throne of the King Emperor. They have a greater regard for their treaties and their plighted word than they have been taught to display

by the other side. A large section of the Indian population has sought to break away from the English connection and the Princes seized this opportunity of stemming the tide of the revolutionary propaganda by lending their weight and support to the federal idea of a stable government. In the second place their country has claimed their allegiance and their patriotic love for their own motherland has inspired this act of surrender of part of their internal sovereignty to the federal government. They are likely to supply the sober and stabilising influence without which no government can command the trust of sensible people. Thirdly, the interests of their own subjects have driven them to secure adequate safeguards for financial justice in any scheme of future fiscal readjustment, and lastly their own instinct of self-preservation has determined for them the line that they have chosen to adopt. Their internal sovereignty was being whittled down before the inexorable claims of Paramountcy which subtly refused to be in any way defined, and whose immortality was proclaimed in a phrase that must ever act like *bete noire* to Indian Princes. In spite of the repeated pledges and pronouncements of successive sovereigns of England their treaty rights and status stood in constant risk of erosion from the inroads of expanding usage and silent sufferance, and when they feared that the royal pledges were not always inviolate or inviolable, they naturally preferred their own participation in the spoils. By their treaties of the last century they had relegated to the British Crown their internal autonomy in war and foreign affairs; by the fresh treaties of the present century they will be prepared to delegate further portions of their internal sovereignty impinging on matters affecting the common interests of the whole country—positions which were most vulnerable to risk from erosion, to any agency in which they hope to have their voice. Wisdom lies in seeing ahead, and if the tide of democracy is advancing, history has taught them that safety does not lie in standing across the fury of

the rolling floods". (*Proceedings of the First Round Table Conference,* pp. 470-71).

*The Princes and the Federal Idea* :— The idea of an All-India Federation, embracing within its fold the British Indian Provinces and the Indian States, and the readiness of the States to join such a federation came as a surprise not only to the British Government but also to the British Indian public. To the Princes themselves it was not a novelty sprung upon them at the Round Table Conference. H. H. the Maharaja of Baroda, for example, had envisaged such a federation as far back as 1917. "For myself I may say the idea of federation has for very many years impressed me as presenting the only feasible means of securing the unity of India. Some of the Princes will doubtless recall that in 1917, I expressed the view that the future constitution of India should be fashioned on these lines". (Speech of H. H. the Maharaja of Baroda—*Proceedings of the First Round Table Conference,* p. 488). The Montague-Chelmsford Report, the Simon Commission's Report as also the Report of the All Parties Conference in India had anticipated, in the distant future, the development of the federal form of government in India. In a statement issued by by the standing Committee of the Chamber of Princes it was stated, 'they realise that the future evolution of an All-India polity can be only on federal lines. A system designed to safeguard their rights of internal autonomy would be the most satisfactory solution of India's problems'. The ideal of the Princess was the establishment of the Federation and it has been apparently realised by the Government of India Act, 1935. How far this federation is capable of fulfilling the high hopes it raised in its conception and what inevitable repercussions it will have upon the future politics of the Indian States, only a detailed study of the Act can reveal.

## CHAPTER II.

### THE PRESENT POSITION OF THE INDIAN STATES.

*Geographical Position* :— The Indian States are nearly six hundred in number and are spread over the whole of the Indian peninsula. A glance at the political map of India will reveal more clearly than any written description the varying sizes and geographical distributions of these territories. In the extreme North is the great State of Jammu and Kashmir. Below it are the Sikh States of the Punjab and the small Himalayan States. Further to the West are the wide domains of the Muslim Princes of Bahawalpur and Khairpur. The Western coast comprises the isolated territory of the Maharao of Cutch and the remarkable peninsula of Kathiawad, a miniature continent including nearly two hundred States, estates and jagirs, of which at least a dozen are of considerable importance. Close to the same coast and interlaced with certain districts of British India are the scattered territories of H. H. the Maharaja Gaekwad of Baroda and a number of smaller States, many of which like the States in Kathiawad, owe tributary obligations to the Ruler of Baroda. In the East, the States are few and far between with the exception of the group of States in Orissa. In the South there are the great States of Hyderabad, the premier State in India, Mysore, Tranvancore and Cochin. In the centre of India, within the Rajputana and Central India

Agencies, are the famous Rajput chiefs who claim descent from the Sun and the Moon and the States of the Holker, Shinde and other remnants of the old Maratha Empire.

*Classification of the States* :— To-day, India numbers within her borders nearly a hundred Princes entitled to the appellation of 'Highness' and a far larger company of rulers, who though not honoured with that title, possess and exercise many of the main attributes of sovereignty. The Butler Committee which investigated the relationship between the Paramount Power and the States classified the States under three categories :—

(1) 109 States the Rulers of which are entitled to a dynastic salute of more than eleven guns, and as such, entitled to be members of the Chamber of Princes in their own right.

(2) 126 States the Rulers of which are represented in the Chamber by 12 members of their order elected by themselves.

(3) 327 petty estates and jagirs who have no such representation.

*Status in International Law* :— The principal States in India are, in the theory of international law, sovereign states and their Rulers enjoy all the privileges and immunities that are enjoyed by heads of independent nations. Regarding the status of Indian Princes, it has been held by British Courts throughout that notwithstanding the exercise by the Crown of certain powers over their States and notwithstanding the declaration of the Government of India in 1891 in the Manipur Case that international law has no bearing on the relations between the Indian States and the Paramount Power, their position is that of independent foreign Potentates or Sovereign Princes. In matters of civil and criminal jurisdiction the Rulers are immune from the jurisdiction of the Municipal Courts of His Majesty and are governed by the principles of international law. The position that State territory is not British territory

has been accepted by jurists and in decisions of Courts. (*Hemchand Devchand* v. *Azam Sakarlal*. I. A. 3. p. 219). The subjects of Indian States are not British subjects and, in theory, owe allegiance only to their own Ruler and not to the King Emperor. This principle has been acknowledged by Parliament in the Government of India Act, 1935, Section 24 of which lays down that a member of the Federal legislature representing an Indian State should take the oath of allegiance to his Ruler only. In *Statham* v. *Statham* (1912 L. R. p. 927) which is a leading case on the question of the legal position of Indian States, the Judges held that a state which in order to provide for its safety places itself under the protection of a more powerful one without, however, divesting itself of the right of government and sovereignty does not cease to rank among the sovereigns who acknowledge no other law than the law of Nations. The position has been even more clearly stated by Viscount Finlay in the famous case of the *Duff Development Company* v. *The Government of Kalantan* (1924, A. C. 797). In this case, his Lordship observed : " It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another power ; the control, for instance, of foreign affairs may be completely in the hands of a protecting power and there may be agreements or treaties which limit the powers of the Sovereign even in internal affairs without entailing the loss of the position of a sovereign power ". If to-day the States command less respect and authority in international politics, the reason is to be found in their obvious inability to assert themselves.

*External Affairs* :— By their treaties with the Paramount power, the Indian States have delegated to the Crown their rights over the external affairs of the States. They cannot hold diplomatic or other official intercourse with any foreign power or even among themselves. Thus they cannot declare war or make peace with a foreign state ; on the other hand,

a declaration of war by the United Kingdom involves the States in war and a declaration of neutrality or peace affects them likewise. For international purposes, the subjects of Indian States are in the same position as British Subjects. In short, for external purposes the whole map of India is red. Although States are usually represented at the Imperial Conferences and the Assemblies of the League of Nations, it is a matter of courtesy and not of right and the representatives are nominated by the Government of India and not selected by the Rulers of the States. Among themselves, although in recent times the rigour of isolation has been considerably relaxed, they are not allowed to negotiate any important arrangement except through the medium of the British Government.

*Internal Administration* :— Although the States have lost all their rights over the external affairs of the States, they are, in theory, sovereign and autonomous in matters of internal administration. All States, however do not possess equal measure of internal autonomy. While some States, like Hyderabad, Mysore, or Baroda, have preserved their internal sovereignty almost in tact, there are others which are required to accept advice or even administrative control from the agents of the Paramount Power. Generally each State manages its own internal affairs by making and administering its own laws, and imposing, collecting and spending its own taxes. Most of the inland States, in the exercise of their sovereignty, impose their own import or export duties on the frontiers of their own territories. Within the domain of a State "the laws of British India are not in force and the writs of the King-Emperor's Courts do not run." (Report of the Indian States Committee, Financial, p. 9).

*The Police and Military Forces* :— The States are responsible for their own police arrangements and were until recently at liberty to regulate the strength of their police force

according to their requirements. The Government of India have now laid down that their previous consent should be obtained before increasing the strength of the armed police force. Greater restrictions exist with regard to the military establishments in the States, both with reference to the strength and the equipment of the troops. In some States, there are troops known as the Indian State Forces which are under the general supervision of the Military Advisor-in-Chief appointed by the Government of India. But in general, the States have the complete control over their military forces and the Commander-in-Chief of India has no jurisdiction over them. Recently, however, certain constitutional lawyers have expressed doubts whether the Commander-in-chief is not also the head of the Army in Indian States. Referring to Section 4 of the Government of India Act, 1935, Sir A. B. Keith says : " It may be noted that the Commander-in-Chief is Commander-in-Chief in India and not in British India only ". (*Constitutional History of India,* p. 330). This view does not appear to be correct since the Government of India Act itself does not *ipso facto* apply to the States and even after the States enter the Federation, only such provisions of the Act will apply to them as are expressly agreed to by them in their Instruments of Accession or are incidental to those provisions.

*Posts and Telegraphs* :— By agreement with the States the British Indian Post and Telegraph system extends generally to all the States but the arrangements are not uniform. Five States, namely Chamba, Gwalior, Jind, Nabha and Patiala, have their separate postal systems but their relations with the British Indian Postal Department are governed by conventions. There are ten other States, like Hyderabad, Cochin, Travancore, etc. which maintain separate postal systems, have no conventions with the Government of India and work in postal isolation. These States have the monopoly of carrying all mails from one place to another within their borders. For the convenience

of the public, a number of British Indian post offices is maintained in their territories. Correspondence consigned to places outside State limits, unless posted at the latter offices, has to pay both British Indian and State postage fees. There are other States which receive free annual grants of service stamps in return for the privileges afforded to the British India Postal Department. These stamps are, however, useful for correspondence within the limits of India only. Correspondence of States consigned for places outside India has to be paid for by the States.

*Currency and Coinage.*—The right to coin its own money is one of the attributes of sovereignty of a state, but this right has been denied to most of the States in India. At the present time the currency needs of the States are almost entirely met by the notes and coins issued by the Government of India. The States which at present exercise the right of coinage are less than twenty in number and in most of them the right is limited to minting of coins of low value or of coins which are used for ceremonial rather than for currency purposes. In only seven States does the local currency constitute a factor deserving consideration. Only the State of Hyderabad possesses a paper currency as well as a mint.

*Railways.*—All States have either voluntarily or involuntarily given free lands for the construction and maintenance of railways in India passing through their territories. They are allowed to construct railways in their own territories but the alignments are required to be approved by the Government of India who take into consideration the possible effects of the new construction on the existng railway lines or in the interest of India as a whole. Generally complete civil and criminal jurisdiction is ceded to the British Government over lands given for the purposes of the railway. The States are allowed usually to retain their jurisdiction on their own lines which are wholly within their territories. In matters

of general railway policy, they are required to follow the guidance of the Railway Board of the Government of India.

*Precedence, Honours and Titles.*—The Crown has assumed the sole discretion in settling precedence among the Rulers of States. It has also the sole authority to grant titles, medals or other decorations and the Rulers are not entitled to grant the titles which the crown grants even to their own subjects. Some of the Rulers grant their own titles and decorations to their own subjects.

*Interferences and Interventions.*—The Paramountcy of the Crown is so vague and unlimited that almost any interference may be justified as being in the larger interests of India, the Empire, and the States themselves. But, in practice, the Crown claims the right to settle disputed successions, interpose its authority during the minority of a Ruler, and to approve of adoptions in cases of failure of natural heirs. It has also claimed and exercised the right to interfere in the affairs of a State in cases of gross misrule or in the interest of the integrity of the State or for the maintenance of peace and order in India. Such interferences may take the extreme form of deposition of the Ruler or curtailment of his authority or the appointment of an officer to supervise the administration. There is no independent tribunal to judge the justification or otherwise of such interference in the internal administrations of the States. The Government of India is both the prosecutor and the judge in the same cause.

*The Resident.*—In their relation with the Paramount Power and, generally, with other States, the States have to correspond through an officer, called the Resident or the Political Agent. Originally intended as an ambassador from one sovereign power to another, the Resident to-day occupies a position altogether incompatible with its orign. For example, article 6 of the agreement dated the 8th March 1802 between the Baroda State and the East India Company says : 'for

the cultivation and promoting the permanency of the good understanding between the two States, there shall be a constant correspondence kept up between them and Agents reciprocally appointed to reside with each'. This reciprocity has never been observed. On the contrary, in most of the States, the Resident far from being an agent claims the right sometimes to withhold even representations made by the State to the Government of India. He assumes not only the role of a guide, friend and philosopher to the State but often even that of a dictator. Usually he contents himself with giving advice. "But 'advice' in Indian diplomatic usage is a euphemism and it does not mean counsel which the party advised may either accept or reject" (HAKSAR and PANIKKAR—*Federal India,* p. 87). It is hardly an exaggeration to say, with greater accuracy in the case of smaller states, that while the Resident or the Political Agent is an 'agent' of the Governor-General *de jure,* he is the Governor-General *de facto.*

*The Chamber of Princes.*—In accordance with the suggestions of the Montague-Chelmsford Report, a body of Princes, under the name of Narendra Mandal or the Chamber of Princes, was brought into existence in February 1921 by Royal Proclamation. This Chamber is not an executive but a deliberative, consultative and advisory body. The Chamber nominally consists of 109 Princes who are members in their own rights besides 12 other representatives chosen from among 127 rulers of smaller states by a system of group voting. The Viceroy is the President of the Chamber. There are a Chancellor and a Pro-Chancellor elected from among the members with a Standing Committee of five more members. The Committee advises the Viceroy on matters referred to it by him and on general matters concerning the States. The Chamber is precluded from discussing treaties and internal affairs of individual states, rights, interests, dignity and powers, privileges and prerogatives of individual Princes. The resolu-

tions of the Chamber are merely recommendatory. The Chamber has not fulfilled the expectations it raised when it was started. Under the actual constitution the power to settle the agenda lies with the Political Department of the Government of India. The Princes have the right to move resolutions; but the Viceroy has the absolute power to veto any resolution on the advice of the Political Department. In effect the Princes exercise no power of initiative and the agenda for the final approval of the Viceroy is framed by the Political Secretary in consultation with the Standing Committee. It is this obvious subservience of the Chamber that has kept many of the leading States either outside it or, if within it, as indifferent spectators. There is only one indirect advantage which the Princes obtained by the establishment of the Chamber. Although directly the Chamber could do practically nothing, it gave an opportunity to the Princes of comparing experience, interchanging ideas and forming mature and balanced conclusions on matters of common interest. The opportunity of informal meetings has created to a certain extent a sense of solidarity and co-operation among the Princes and has impressed upon them the absolute necessity of disciplined unity as the only shield against the forces of reaction or even destruction.

## CHAPTER III.

### THE INDIAN STATES AND THE FORMATION OF THE FEDERATION

*Introduction.*—There is a fundamental distinction between the political status of the two main divisions of India. The British Indian Provinces are merely territorial subdivisions utilised for administrative convenience and are legally under the complete dominance of Parliament. It is within the power of Parliament to give them whatever constitution it likes. The position of the Indian States is, however, altogether different. The States are sovereign and independent so far as their internal affairs are concerned and are bound to the Crown by means of treaties, engagements, Sanads, usages and political practice. The rights, authority and jurisdiction exercised by the Crown in British India, do not extend to the Indian States, nor has Parliament any authority to legislate directly for them. While the Government of India Act, 1935, turns the provinces of British India into largely autonomous units and welds them into a federation whether they want it or not, it is not *ipso facto* applicable to the States and does not by itself create an All-India Federation. The Act lays down merely the plan of the federation, the method by which a state can accede to it and sets out the constitutional consequences of the accession. In other words, it makes an offer which it is for

the states to accept or reject. It is the free choice of the ruler of a State whether or not to accede to the Federation, a position eminently compatible with his sovereignty.

*Constitutional Provisions relating to Accession* : Section 5 and 6 of the Government of India Act lay down the procedure by which the Federation of India is to come into existence. Section 5 provides that the Federation is to be constituted by a proclamation made by His Majesty the King Emperor. Two essential conditions must precede such a proclamation : (1) An address in that behalf must have been presented to the King by each House of Parliament ; (2) Rulers of States representing not less than half the aggregate population of the States and entitled to not less than half the seats allotted to the States in the Federal Upper Chamber, must have signified their desire to accede to the Federation. Under Section 6, a State is to be deemed to have acceded to the Federation if His Majesty has signified his acceptance of an Instrument of Accession executed by the Ruler thereof, whereby the Ruler for himself, his heirs and successors—

(*a*) declares that he accedes to the Federation as established under the Act, with the intent that His Majesty the King, the Governor-General of India, the Federal Legislature, the Federal Court and any other Federal Authority established for the purposes of the Federation, shall, by virtue of his instrument of Accession, but subject always to the terms thereof, and for purposes only of the Federation, exercise in relation to his State such functions as may be vested in them by or under the Act ; and

(*b*) assumes the obligation of ensuring that due effect is given within his State to the provisions of the Act so far as they are applicable therein by virtue of his Instrument of Accession.

This Section further provides that an Instrument of Accession may be executed conditionally on the establishment

of the Federation on or before a specified date and in that case the State shall not be deemed to have acceded to the Federation if the Federation is not established until after that date.

In an instrument of Accession will be set out the matters which the ruler accepts as being within the scope of Federal powers over his State. It will specify also the limitations which he desires to impose upon those powers. By a supplementary Instrument executed by him and accepted by the Crown, a Ruler may vary the Instrument of Accession of his State by extending the functions which by virtue of that Instrument are exercisable by the Crown or any Federal Authority in relation to his State. It is to be a term of every Instrument of Accession that certain matters (set out in the second schedule to the Act) may, without affecting the accession of the State, be amended by or under the authority of Parliament. No such amendment, however, is, unless it is accepted by the Ruler in a supplementary Instrument, to be construed as extending the functions which by virtue of the Instrument are exercisable by His Majesty or any Federal Authority in relation to the State.

The Crown is not bound to accept any Instrument of Accession or Supplementary Instrument. If the Crown considers that the terms of the Instrument are inconsistent with the scheme of Federation that Instrument is to be rejected. However, a State's Instrument of Accession once accepted is to be conclusive as to the extent of Federal authority, both legislative and executive, in relation to that State. As soon as possible after any Instrument of Accession or Supplementary Instrument has been accepted by the Crown, copies of it and of His Majesty's acceptance are to be laid before Parliament, and all Courts are to take judical notice of every such Instrument.

After the establishment of the Federation, the request of a Ruler that his State may be admitted to the Federation is to be transmitted to His Majesty through the Governor-General. After the expiration of twenty years from the establishment of

the Federation, the Governor-General is not to transmit to His Majesty any such request until there has been presented to him by each Chamber of the Federal Legislature, for submission to His Majesty, an address praying that His Majesty may be pleased to admit the State into the Federation.

*Conditions for the Establishment of the Federation.*—We have noticed that the formation of the Federation depends on two essential conditions. It has been stipulated that before His Majesty proclaims the formation of the Federation, Rulers of States representing not less than half the aggregate population of the States and entitled to not less than half the seats allotted to the States in the Federal Upper Chamber must have signified their desire to accede to the Federation. The real significance of this stipulation can be understood when one considers the fact that the entry of the States was made a condition precedent for the grant of responsibility at the Centre. The Joint Select Committee says that the Ruling Princes have, in the past, been firm friends of British rule, and that they may be expected to give steadfast support to a strong and stable central Government (*Report*, p. 30). The obvious aim of bringing the States within the fold of the Federation is to bring in a stable and conservative element so essential for the development of any form of constitution. This object could never have been served if no such condition was laid down and the Federation made possible without even the accession of the States. Looking from the point of view of the States, the existence of such a condition would appear quite essential. The States are already under a glaring disadvantage due to the inequality of representation in the Federal Legislature. They have been relegated to a position of statutory minority in both the Houses. Under these circumstances, taking for granted that only a few States join the Federation, their representatives will be in a helpless minority in the Legislature and will be inevitably swamped by British Indian representatives. They will find

themselves in a very awkward plight, escape from which will be impossible. The Act, therefore, lays down that the Federation cannot be brought into existence till States having a total population of about 40 millions out of the population of about 80 millions of State subjects in India agree to join the scheme. The States are entitled to 104 representatives in the Council of State or the Federal Upper Chamber and it has been also laid down that not only States representing half the population but also entitled to half the number of representatives must express their desire to participate. The second condition, relating to the presentation of an address by both Houses of Parliament to His Majesty, appears to have been inserted to afford Parliament an opportunity to satisfy itself that the political conditions in India warrant the introduction of the Federation. No such conditions were laid down either in the British North America Act which created the Federation of Canada or the Commonwealth of Australia Act which formed the Federation of Australia. The obvious reason is that while the constitutions of Canada and Australia were the result of the spontaneous actions of the States themselves, the constitution of India is the creation of the British Parliament and is being imposed on the units which are to form the Federation. The provision seems to have been made to give an opportunity to Parliament to revise its decision if the strength of opposition to the Government of India Act, 1935, or some parts of it, warrants such a revision. The possibility that political events in India may take a turn which may jeopardise the formation or later the existence of the Federation has already been envisaged by the framers of the Constitution in making a provision for government in the event of the breakdown of the new Constitution. No such provision for a possible breakdown of the Constitution is seen in any other federal constitution.

*The Absence of Time Limit for the Formation of the*

*Federation.*—The Government of India Act was passed in 1935 and while the provisions of the Act relating to the Provinces were put into operation from the 1st of April 1937, those relating to the formation of the Federation have not yet been put into operation, nor is there any constitutional obligation on the British Government to establish the Federation before a fixed date. The Constitution Acts of Canada and Australia fixed the maximum periods, in each case, before the expiring of which the proclamation inaugurating the Federation was to be issued, 'not later than six months' (*Section* 3) in the case of Canada and 'not later than one year' (*Section* 3) in that of Australia. The absence of any corresponding section in the Government of India Act is perhaps due to the realisation of the complexity of the political situation in British India and the difficulties involved in negotiating a separate Instrument of Accession with each State.

*The Instrument of Accession—a Treaty.*—Section 6 of the Government of India Act acknowledges an important privilege of the States. It recognises the independent existence of the States who can be brought within the Federal fold not by unilateral action of Parliament but by a bilateral agreement between the Crown and the Ruler of a State by which the Ruler agrees on his part to surrender certain portion of his sovereignty to the Federal Government over certain specific subjects and the Crown on its part guarantees the strict observance of the arrangement in the letter and spirit of its terms. The Instrument of Accession, as this arrangement is termed, is, therefore, a treaty between two sovereign powers and must command the same respect and authority as an international treaty. By the Instrument of Accession, a Ruler declares that he accedes to the Federation as established by the Act of 1935 and gives complete authority to all the Federal organs of government in his state over the subjects accepted by him and subject to the limitations imposed by the Instrument

of Accession. The Instrument, therefore, fixes the limits of federal authority with respect to a State, or in other words the Ruler while agreeing to accept the authority of the Federation by the Instrument, says 'Thus far and no further'. The usual process of the formation of a federation is by agreement between the units of the federation. In India, there is no such agreement between the States and the Provinces of British India but a treaty between the Crown and the States. The only parallel to this process of federalisation is to be found in the formation of the German Empire. The Confederation of Germany was formed by Prussia conducting independent negotiations with the twenty-one States which desired to federate with her and concluding separate treaties with each of them. The validity of the constitution depended upon these treaties by which the Rulers of different States surrendered a common measure of their powers. The constituent assembly merely ratified the constitutions created by the treaties.

*Stipulation regarding the Date of Establishment of Federation.*—Section 6 provides that while executing an Instrument of Accession a Ruler may insert a condition that the Instrument is valid provided the Federation is established on or before a specified date and the State shall not be deemed to have acceded to the Federation if it is not established until after that date. This provision is clearly essential for the protection of the interests of the States. The States representatives, led by Sir Akbar Hydari, had made it quite clear during the constitutional discussions that they would be prepared to join the Federation only on condition that the financial position of the British Indian provinces was sound on the date when the Federation came into existence. The Instrument of Accession will be made by a Ruler on a certain basis and it would be certainly unfair to force him to join the Federation if the conditions under which he executed the Instrument have materially altered due to circumstances for which he was in

no way responsible.

*Scope of the Instrument of Accession.*—In his Instrument of Accession a Ruler is required to specify the matters which he accepts as subjects with respect to which the Federal Legislature may make laws in his State. While normally the Governor-General will insist on an irreducible minimum of subjects which a Ruler must accept as federal, there will be slight variations both in the quantum of subjects for which a state may accede and which may be regarded as the core of the Federation, and the extent of control over each subject by the Federal Centre. There are States which will be able to make out a good case for the exception or reservation of certain subjects, some by reason of existing treaty rights, others because they have long enjoyed special privileges in matters which will henceforth be the concern of the Federation. Thus a state like Hyderabad may include a stipulation safeguarding her rights of issuing currency notes and maintaining her postal system, or maritime States, like Baroda, Cochin, etc., may insert conditions to safeguard their interests in their ports and commerce. Some of the critics of the Government of India Act have objected seriously to this special concession to the States to enter the Federation on their own terms while no such choice has been left to the British Indian Provinces. The explanation for this lies in the difference between the constitutional status of the two divisions of India. Moreover, entry into the Federation with reservations is not altogether a novel conception introduced in the Act. Similar reservations and conditions were made by several States in Imperial Germany when they entered into treaties with Prussia. Bavaria, for example came into the German Empire on special terms reserving an independence much greater than the other States retained in the management of her army, her railways and her posts and telegraphs. However undesirable they may appear to be from the point of view of the British Indian critic, such reservations are essential to in-

duce the states to join the Federation without unnecessary or undue sacrifice and loss of privileges enjoyed by them since times immemorial. Federation is after all a new experiment in India and it is natural that States may not like to surrender their rights and privileges unconditionally and thus take what may appear to them, a leap in the dark. It is not unlikely that happy experience of the practical working of the Federation may induce them to relax these reservations and bring themselves in line with British Indian provinces in federal subjects Moreover, the Act itself has provided against excessive reservations by any State which would render its entry into the Federation a sham by reserving to the Crown the right of rejecting any Instrument of Accession. Normally a state will be expected to accede for all the subjects in the federal list and the burden of proving the necessity of special reservations will be on the state demanding such reservations. This provision will, therefore, preclude the state from insisting on conditions or reservations which would make its accession merely colourable or illusory.

*Supplementary Instrument of Accession.*—The Instrument of Accession which a Ruler may execute is not the final or unalterable document so far as the scope of the subject matter is concerned. The Act provides that an Instrument of Accession may be varied by a supplementary Instrument whereby Federal authority may be extended into the State. While it thus makes provision for the extension of federal authority, it is silent with regard to the reduction in the scope of federal authority on subjects for which a Ruler originally acceded. The Secretary of State for India explained the point in the course of the debate in the House of Commons on 27th February 1935. Referring to a question, put to him before the Joint Parliamentary Committee, whether the provision in subsection (2) of Clause 6 for supplementary declaration meant that a Ruler having once made an acceptance of such and such

federal subjects, subject to such and such qualifications, can by a subsequent instrument withdraw his acceptance of any federal subject or add fresh qualifications or limitations to it the Secretary of State said "The answer is 'no'. The intention of sub-section (2) is to enable a Ruler who has accepted, say, 40 subjects as federal, to signify his acceptance of further subjects or, alternatively, having accepted a particular item, subject to qualifications, to restrict those qualifications". It would, therefore, appear that once a Ruler takes a step, retreat is impossible. The choice of subjects which a Ruler once makes is final and although the scope can be enlarged, it cannot be restricted. This condition is, of course, reasonable as otherwise the smooth working or even the existence of the federation itself may be endangered.

*Uniformity of Terminology.*—In addition to the uniformity, as far as possible, with regard to the subject matter of the Instruments of Accession, the Crown will insist on uniformity as far as practicable even in the phraseology of the Instruments. These Instruments are the basis of the contracts between the Crown and the States and as such they will have occasionally to be interpreted by the Federal Court. The task of interpreting them as well as the observance of the binding nature of the interpretation will be insuperably difficult if the Instruments exhibit a wide diversity in terminology.

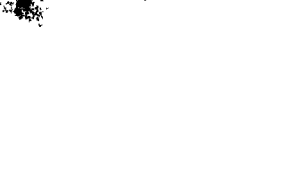
*Certain Amendments to the Act*—While executing an Instrument of Accession, a Ruler will have to agree in the Instrument to the amendment of certain matters, set out in the second Schedule to the Act, by or under the authority of Parliament, without affecting the accession of his State. Such amendment, however, cannot be applicable to his State unless the Ruler accepts it by a supplementary Instrument. The subjects mentioned in the second Schedule relate purely to British India and no State can have any reasonable objection to their amendment, so long as its rights are in no

way affected. But this specific mention of the second Schedule raises a very controversial question concerning the authority of Parliament. The question is whether by specifically mentioning schedule (2), Parliament has precluded itself, from altering any other provisions of the Government of India Act, 1935 or, in other words, whether it has placed a permanent restriction on its omnipotent powers of legislation. In this connection, Prof. G. N. Joshi observes: "The Act does not restrict the authority of Parliament to do so. All that it provides is that if the amendment of the provisions in schedule (2) involves the extension of federal authority over the States, that extended authority is not binding upon the States unless accepted by them. But as regards amendment of other provisions relating to the federal sphere and its effect on the States, the Act is silent. In general, Parliament will not amend those provisions without the consent of the Rulers, but if it does, its action is legal, and the matter as regards the States would have to be regularised by supplementary Instruments." (*The New Constitution of India,* p. 112). Prof. Joshi does not appear to be correct in view of the acknowledged principle of law that while Parliament has uncontrolled powers of legislation in respect of British India, it has no such power over the States. Any amendment by Parliament, therefore, which affects the accession of the States is *ultra vires* and if its execution is insisted upon, the States must either accept the amendment by a supplementary Instrument or insist on their legal right to secede from the Federation. In view, however, of the subjection of the States to the Paramountcy of the Crown the former course is the only feasible one. This point will be further discussed while discussing the general question of amendment of the constitution.

*Accession of States after Establishment of Federation.*— The Federal Legislature has no power over accession of the States for twenty years after the establishment of the Federa-

tion. During this period, the request of a Ruler for admission to the Federation will be transmitted by the Governor-General to the Crown. The provision seems to have been made to induce the States, who first hesitated to join, to do so after watching the actual working of the Federation for some years. After the expiry of this period, no request for the acceptance of an Instrument of Accession will be transmitted to the Crown, unless both Chambers of the Federal Legislature have addressed the King, asking that the State may be admitted to the Federation. This device has been introduced to ascertain the feeling of the Legislature. "The period is somewhat long but no doubt any late accessions may be weighed by the Crown in the light of feeling in the Legislature, though it has no formal *locus standi*". (KEITH—*Constitutional History of India*, p. 328). This means that although the opinion of the Legislature may be ascertained, the Crown is not bound to abide by that opinion.

*The Accession of the States and Paramountcy.*—By his Instrument of Accession, a Ruler agrees to the exercise of certain powers by the Federal Government within his dominion. These powers extend only to the subjects, and subject to limitations, mentioned in the Instrument. Section 285 of the Act says "Subject to the provisions of the Instrument of Accession of that State, nothing in the Act affects the rights and obligations of the Crown in relation to any Indian State". The point was further explained by the Secretary of State for India: "If a State accedes to the Federation, paramountcy will not be applicable to that extent; paramountcy will to that extent be limited.... In other respects, whether a state federates or not, paramountcy must remain a fact affecting its relationship with the Crown.....In the ultimate analysis, however, the Crown's relationship with the States is not merely one of contract, and so there must remain in the hands of the Viceroy an element of discretion in dealing with the States. No



successful attempts could be made to define exactly the right of the Crown's Representative to intervene". (*House of Commons Debates*, 20th March 1935). In short, the paramountcy of the Crown remains intact and the Viceroy as the Representative of the Crown will continue to deal directly with the States regarding subjects for which they have not acceded to the Federation. It is needless to point out that the States which do not join the Federation are absolutely unaffected by the Government of India Act, 1935, their relation with the British Government remaining in *status quo*.

## CHAPTER IV

## THE INDIAN STATES AND THE FEDERAL LEGISLATURE

*Introduction.*—The Indian States, as sovereign political entities, are expected to enter the Federation of India of their own free will. But once they agree to enter it by executing the Instruments of Accession they become amenable to all the provisions of the Government of India Act, 1935, so far as they are applicable to them and subject to the reservations or limitations placed on them by their Instruments of Accession. The Instruments can define the scope of legislative powers of the Federation with respect to the particular States and can prescribe the extent of Federal authority which can be exercised in virtue of those powers. These Instruments do not, however, give the States the power to negotiate with the Crown the terms of their representation in the Federal Legislature or in other Federal organs. These terms have been dictated by Parliament in the Government of India Act and the choice to the States is either to remain outside the Federation or to accept the Federation as enumerated in the Act. Taking for granted that the Indian States agree to join the Federation, we proceed to consider how far their autonomy or independence in legislative matters is restricted or modified, what part they will play, individually and collectively, in the Federal

Legislature and to what extent they can influence the course of Federal Legislation in India.

*Constitutional Provisions.*—(*a*) The composition of the Federal Legislature : The Federal Legislature consists of His Majesty the King Emperor, represented by the Governor-General, and two Chambers, the Council of State and the House of Assembly. The Council of State consists of 156 representatives of British India and not more than 104 representatives of the Indian States. The House of Assembly consists of 250 representatives of British India and not more than 125 representatives of Indian States. The number of the representatives of the States in the two Chambers depends upon the number of States acceding to the Federation. So long as one-tenth of the possible seats are vacant, the members appointed to the seats filled may choose up to half the number of the seats unfilled, but this power is not to last for more than twenty years after the establishment of the Federation. The Council of State is a permanent body, not subject to a dissolution, but, as nearly as may be, one third of its members are to retire every three years and be replaced by an equal number. The House of Assembly, unless sooner dissolved, is to continue for five years.

(*b*) Qualifications for a representative : The representative of a State in either Chamber must be a British subject or the Ruler or the subject of an Indian State which has acceded to the Federation. In the case of a seat in the Council of State, the representative must not be less than thirty years of age and in that of the House of Assembly, not less than twenty-five years. These restrictions do not apply to a Ruler exercising ruling powers. Ordinarily the holder of any office of profit under the Crown in India is disqualified from membership. However, if a person, while serving a state, remains a member of one of the services of the Crown in

India and retains all or any of his rights as such, he is not disqualified from membership of the Legislature.

(*c*) Powers of Legislation : The two Chambers have co-ordinate powers of legislation excepting in matters of money grants which must be submitted first to the lower Chamber, the House of Assembly. In case of a deadlock between the two Chambers, the Governor-General has been empowered to resolve it by convening a joint session of the Chambers, if necessary. The legislative authority of the Federation with regard to the States extends only to those items which are expressly agreed to by the Rulers in their Instruments of Accession and subject to all the reservations mentioned therein. Even in these items, the jurisdiction of the Federal Legislature is not exclusive ; the States may also legislate on such matters but if any of the provisions of their legislation is repugnant to a Federal law which extends to that State, the State law, whether passed before or after the Federal law, is to be void to the extent of the repugnancy. The question of the exercise of residuary powers between the Federal Legislature and the States does not arise because all powers not expressly conceded by the States to the Federation are reserved to the States.

(*d*) Distribution of State Representation : In the Council of State, the seats allotted to the States are distributed amongst them, having regard to their dynastic status, salutes, importance, population etc. Thus Hyderabad, gets 5 seats ; Mysore, Kashmir, Gwalior and Baroda get three each ; the smaller States get fewer seats and the very small States are grouped and their Rulers are to choose jointly in rotation a representative for the Upper House. Seats in the House of Assembly are distributed on a similar basis, the main consideration in this case being given to population. Hyderabad, with a population of some 14,000,000, gets sixteen seats ; Mysore with a population of over 6,000,000 gets seven seats ; other

States get fewer seats according to their population. The detailed distribution of seats is given in schedule I of the Act.

(*e*) Oath of Affirmation in the Legislature : Every member of either Chamber has to take an oath or affirmation in lieu thereof, in the prescribed form. While a British subject swears to be faithful and to bear true allegiance to His Majesty the King Emperor of India, a subject of the Ruler of an Indian State swears to be faithful and to bear true allegiance to his Ruler alone. A Ruler of a State takes the oath of allegiance in his capacity of a member of the Chamber only.

(*f*) Protection to the States within the Legislature : The Chambers of the Legislature are to have the usual right to make rules for regulating their procedure and conduct of work. But the Governor-General is empowered to make, after consultation with the Presidents of the Chambers, rules regulating the procedure in matters affecting his functions when acting in his discretion or in his individual judgment. These functions include prohibiting the discussion of, or the asking of questions on, any matter connected with an Indian State outside the federal sphere, unless he considers that the matter affects federal interests or a British subject, and has consented to its discussion or to a question being asked thereon. Similarly he can prohibit any question or discussion about the personal conduct of the Ruler of any Indian State or a member of the ruling family of the State.

*Bicameralism in the Federal Legislature* :—The Federal Legislature in India, as we have seen, is bicameral, but, beyond the existence of two separate Chambers, it does not exhibit any of the characteristics of a bicameral legislature. The importance of having a second chamber, where the lower chamber is based on popular election, lies in the fact that it affords an opportunity to men qualified by their special knowledge, experience or position to bring these qualities to bear upon the course of legislation. Also a second chamber is expected to be

a revising chamber or at least a check upon the hasty legislation of the lower Chamber which, being based on broad principles of popular representation, is more amenable to transient gusts of popular emotion. It is for these reasons that the selection of members to the two chambers is usually made on a different basis. In India, so far as the representatives of the States are concerned, they enter the two chambers by the same process, namely nomination by the Rulers concerned, and are bound to exhibit the same trend of opinion in the chambers. British Indian representatives, it is true, enter the Council of State by direct election and the House of Assembly by indircet election by the provincial legislatures. But they are not likely to exhibit any diversity of interests or opinions and the possibility is that they will reflect the same tendency in both chambers. Moreover, as observed by Sir J. A. R. Marriott, 'the plain man ought to be able to explain at once why an upper chamber is superimposed upon the lower'. (*Mechanism of the Modern State*, Vol. I, P. 421). The House of Lords in England is characteristic of this principle. There is absolutely no such distinction between the two chambers in India which can appeal to a plain man and hardly any which can attract even a student of constitutional law. It is, of course, an undisputed fact that, whatever the merits or otherwise of a bicameral legislature, all Federal legislatures in the world are uniformly bicameral; and of course there can be no objection to the existence of two chambers if it is merely an imitation of other federal constitutions! But federal upper chambers are always pre-eminently distinctive. They differ materially from the lower chambers either in their composition or in their authority. Thus the Federal upper Chambers in the United States of America, Switzerland and Australia represent the equality and the independence of the units, irrespective of their size or population. The German Bundesrath, although based on representation of States according to population and importance,

was representative of the Princes and the Free cities as opposed to the Reichstag which represented the people generally. The American Senate is elected practically on the same basis as the House of Representatives but it has special powers and authority in executive matters which differentiates it from the lower House. The Australian Senate which is also elected on a popular basis but has no special functions, has, as observed by Lord Bryce, become merely a weak replica of the lower Chamber. (*Modern Democracies,* Vol. II, P. 204). The Council of State in India does not represent the equality of the units nor does it possess any distinctive characteristics which mark the American Senate or the German Bundesrath. Although it is yet premature to say what exactly the position of the Indian Upper Chamber will be, there is every possibility that it will be a mere replica of the lower Chamber as in Australia, though it is not likely to be ' as nearly a cipher as it is possible for an assembly legally invested with large powers to be '—a description which Prof. Goldwin Smith applies to the Canadian Senate. (*Canada and the Canadian question,* p.163). Thus bicameralism in the Indian Federal Legislature owes its existence more to the ostensible loyalty to the federal form than to any inherent advantages of the system in general and in federal constitutions in particular. Neither the Secretary of State for India in his evidence before the Joint Parliamentary Committee nor the report of the Committee itself, gives any convincing grounds for the creation of the two chambers in India. The provision in the Act for a joint session of the two chambers, in cases of deadlocks, is bound to make the distinction between the two chambers, if there is any distinction at all, quite imperceptible in course of time.

*The Composition of the Council of State* :—The Composition of the Council of State, the Upper Chamber, does not follow the usual procedure of second chambers in some of the leading federal unions. The principle of representation of the

units in the second chambers in the United States, Switzerland and Australia is that of complete equality between the units. It is the political entity which is the basis and not the mere fact of population. A striking instance is that of the United States where New York with a population of more than 12,500,000 has two representatives in the Senate while Nevada with a population of about 90,000 also has two. No doubt the Bundesrath in Germany was not constituted on this basis but it protected the States in other ways. In India, during the course of constitutional discussions, the representatives of the States, especially those of small States, had insisted on a large size of the legislature to enable all the States to obtain, if not equality of representation, at least some representation. The smaller States strongly objected to their absorption in artificial groups formed for the purpose of representing a number of such States. Although a sound argument, it was not a practicable proposal, as it was obviously impossible to give individual representation to nearly six hundred States. But there was another proposal which was not only sound in principle but was equally feasible in practice and appears to have been rejected because of the pressure of British Indian representatives. Broadly speaking, there are two distinct political systems in India which are being brought together into a federal form. Thus British India, on the one hand, and the Indian States on the other, can be considered as the two main units of the Federation. That they have been so considered is quite apparent from the fact that the States have been allotted 40 per cent of the seats in the Upper Chamber and nearly 33 per cent in the lower, the division having been made on the broad basis of British India and the States. The States had insisted that in keeping with the spirit of the federal principle of equality and with a view to give them sufficient voice in the Upper Chamber, the representation to these two main units should be equal. The British Indian representatives claimed on such grounds as area and population a prepon-

derance of seats for British India. That mere population cannot be the basis of representation was accepted by the Federal Structure Committee who said "though opinions differed as to the precise degree of 'weightage' to be conceded to the States, the Sub-Committee are unanimous that some weightage must be given, and that a distribution of seats as between the States and British India on a strict population ratio would neither be defensible in theory nor desirable in practice." (*Proceedings of the First Round Table Conference*, P. 218). The danger to the States from the unequal distribution of representation was clearly pointed out by Sir Liaquat Hayatkhan at the Second Round Table Conference. "Here, we are dealing", he said, "with governments of the federating units; we are concerned with the federating provinces of British India on the one hand and on the other with the federating States. Any inequality in representation, any departure from 50-50 ratio of allotment of seats between the two parts of the Federation will necessarily condemn the Indian States to the position of perpetual inferiority". Arguing further, Sir Liaquat said: "The States are undoubtedly entitled to claim larger representation on the ground of their political importance and internal sovereignty. They are also entitled to claim larger representation in view of the fact that they do not in any manner improve their legal status and position by accepting the federal scheme while British India will certainly be able to realise one of its political aspirations". (*Proceedings*, P. 351-52). In spite of all their arguments, the States succeeded in getting only 40 per cent. of the seats on the Council of State, the federal Upper Chamber in India.

*The Composition of the House of Assembly* :—The composition of the House of Assembly is also far from satisfactory. Here the States get 33 per cent. of the total number of seats; that is a little more than what they would have been entitled to on a strict population ratio. It is an evidence of the recognition

that even in the lower Chamber, a strict rule of numbers cannot be logically applied in view of the peculiar position of the States. The lower Chambers in all federal unions are uniformly based on the principle of population but, even there, the whole nation is not considered as a unit divided into electoral districts for the purposes of election to the lower chambers ; the distinct identity of the States is maintained and a stipulation is generally made that every small unit must have at least one representative and that electoral districts should not cut across cantonal or State boundaries. Another point deserves consideration. A distinction must be drawn between federal unions the component parts of which are all republican and those unions the component parts of which are some of them republican and others monarchical. The constitution of the lower houses in republican federal unions can be based on population alone, as ultimately the people are sovereign but a distinction ought in theory be made between such unions and the federal union in India where a large number of States have the monarchical form. It can be argued that even in Imperial Germany wherein there was the existence of monarchical governments as in India, the Reichstag was elected on the basis of population. While admitting the truth of this argument, one must not forget that in Imperial Germany the Bundesrath which represented the governments of the States was practically every thing and the Reichstag, which represented the people, was practically nothing. The House of Assembly on the other hand, is not only co-ordinate in authority with the upper house but has greater powers in some other respects. The allotment of only 33 per cent. of the seats in the House is bound to weaken the position of the States in the Federal Legislature.

*The Position of the States in the Federal Legislature* :— Apart from their position in each of the chambers, it is necessary to examine the position of the States in the Federal Legislature as a whole. The States have been already relegated to a pos-

tion of perpetual minority by the allotment of only 40 per cent. of seats in the upper Chamber and 33 per cent. in the lower. The position becomes worse in the case of a joint session in which the States can command a little more than 36 per cent. of the total votes. Even this percentage is based on the assumption that all the States join the Federation and that no State seats are vacant. It is quite likely that some of the States may remain outside and the strength of the State representation may suffer. There is no such possibility in the case of British Indian provinces and those seats cannot remain unfilled. At least the total number of members in the Upper Chamber ought to have been larger. If the Upper Chamber has to play its due part in the joint session of the two Houses and retain its position, its size ought to have been substantially large in order that in quality and numbers it may effectively influence deliberation in a joint session. Taking for granted that the representatives of the States form a solid group, which is of course not likely as we shall see later, they will not be able to make their will felt in a legislature consisting of more than 60 per cent. representatives from British India. The Government of India Act does not give the States any other protection to compensate for this inferiority in representation. Although improbable, it is not impossible that the Federal Legislature may thrust upon the States legislation which they unanimously oppose. There should, at least, have been a provision that no federal legislation which has not been approved by at least a majority of the States representatives should be applicable to the States. If entry of the States with reservations can be defended in theory, such restrictive provisions can be defended likewise. There is still a greater disability from which some of the States will suffer. The larger States have independent representation in the Chambers and they can make themselves at least heard. But the smaller States have been grouped together sending representatives by rotation. Some

of them, therefore, will have at one time or another no representatives in either chamber. This position may, in effect, mean that federal legislation will be forced upon certain States without giving them even an opportunity to place their views before the Legislature. This is hardly justifiable in theory and certainly reprehensible in practice. It is opposed to all canons of natural justice which require that a party affected must have an opportunity to have at least its say. In Imperial Germany the members of the Bundesrath had the right to appear in the Reichstag to explain and defend the policy of their States. Even in Republican Germany the States or Länder have the unusual right to send plenipotentiaries to sittings of the National Assembly and of its committees, as a means of submitting the views of their cabinets on matters under consideration. Even in Switzerland the Cantons can exercise by correspondence the right to suggest legislative changes. When it is considered that these rights exist in spite of adequate representation of the States in the Federal legislature of these countries, the necessity and the importance of similar provision in the case of Indian States who have absolutely no representatives, becomes obvious.

*The States and Element of Stability in the Legislature* :— There is no denying the fact that the entry of the States in the Federation was insisted upon as the essential condition precedent to the grant of responsibility at the centre. The States with their traditional loyalty to the British throne and with 'autocratic' forms of government are expected to be a static element in the Legislature as opposed to the British Indian representatives who will be more dynamic. The Joint Parliamentary Committee have also referred to this element of stability which the States are expected to bring within the Federal Legislature (*Report* para. 30). The point has been very prominently and clearly explained by Lord Halifax, the ex-Viceroy of India and a member of the Joint Parliamentary Committee. Speaking at Chatham House on 4th December 1934, Lord Halifax said : "While

it would be quite untrue to argue that on all points representatives of the States would see eye to eye with British opinion, yet the Committee felt a tolerable certainty that the representatives sent up to Delhi by the Princes, would be always, by the nature of things, alive to the paramount importance, firstly, of firm and stable government, secondly of defence, and thirdly, of the essential necessity of preserving the Imperial connection. Those three things,—order, defence and Imperial connection—were matters in which, by all their traditions and all their history, the Committee felt that the States were wholly and entirely to be relied upon and I have no doubt that that influenced their judgment on the question". (*International Affairs,* March 1935). One really doubts how far these expectations of British statesmen about the role of the Princes will be fulfilled in a Legislature which has reduced the sovereign States to a position of perpetual minority and consequent political inferiority. Even then these expectations are evidently based on the combination of two elements—disunion among the British Indian representatives and complete harmony among the States representatives. The former is as highly probable as the latter is higly improbable. As we shall see later, there is absolutely no reason why the representatives of the States will form a united team ; on the contrary, the probabilities are just the reverse. Apart from the quantity of the representation of the States, let us consider how far its quality can secure stability and what the position of the Princes will be in the Legislature which professes to maintain stability. A harrowing picture of the condition of the Princes in the Federal Assembly was drawn by Mr. Winston Churchill during debates in the House of Commons on the Government of India Bill. Mr. Churchill said : "Anything more lamentable can hardly be conceived. They will be expected to uphold stability, the conservative point of view, to sustain the Imperial authority and be as it were behind the Viceroy. What is to be the posi-

tion of the Princes under this ordeal? Congress are not going to be idle in this new Assembly, and any Prince who makes himself prominent in defending imperial interests and in acting in accordance with the sentiments of loyal allegiance will be a marked man. He will be the subject of a double attack. Agitation will be raised in his dominion behind him, disorders will occur, comments and criticisms will be made and there will be pressure at the centre to show how he is reactionary in neglecting his State and how much happier they are in the States of those Princes who have conformed to the views of the Congress. I say you will be in a dreadful position. If you imagine that they are going to be an element of stability, I believe that you make a profound mistake. There will be no element of stability there. Once the British power has definitely disinterested itself in this aspect of its affairs in India, the Princes of India have no choice whatever but to throw in their lot with their own fellow countrymen and that is what they will do under the remorseless pressure of political events". This warning to the British Statesmen or these forebodings cannot be dismissed as the irresponsible harangue of a die-hard politician. Every impartial student of current Indian politics will undoubtedly agree that these words contain an element of truth which the Indian Princes cannot afford to disregard. In their zeal and anxiety to secure a stable equilibrium in the Federal Legislature, the British statesmen have placed the States in the position of the Chinese doll set on a spherical base, a device familiar to school-children as an illustration of stable equilibrium. While the whole apparatus regains its equilibrium after a rude shock, the head of the doll oscillates during the shock from the north pole to the south and it is not inconceivable that the States may experience this phenomenon in their life in the Federal Legislature.

*Influence of States in Federal Legislation* :—Taking the Federal Legislature as it is, the question which prominently

comes up is 'how far can the States representatives influence the course of legislation in the Federal Legislature?' The answer to this question depends upon the position they will occupy in the formulation of parties in the Legislature. By the very constitution, they cannot form the majority party. But even if they can form a united party of their own, in the Council of States where they secure 40 per cent. of the seats and in the House of Assembly where they have 33 per cent., they can wield a considerable influence in the Houses. In view of the curious composition of the Legislature and the equally curious process by which representatives from British India will enter it, it is impossible to foretell what the exact alignment of parties will be. It cannot be definitely predicted whether parties will be formed on broad national policies or on petty communal distinctions. At any rate, circumstances point to the possibility of a multiplicity of parties on French lines. In such a Legislature, the States can command appreciable influence if their representatives form a strong united party. But can they do this?

*Can the Representatives of the States form a party?*—The most important factor which must determine the influence of the States in the Federal Legislature is the ability of their representatives to form a strong political party which can play its appropriate role in parliamentary politics. The natural causes which promote the union of individuals are practically absent. The States differ in their origin and their historical traditions. They differ in language, in culture, in social and economic conditions, in educational progress and in political development. In their political importance they exhibit enormous diversities, the big State of Hyderabad on the one side and a small state in Kathiawad with a few acres of land on the other. To add to this, there is the barrier of political precedence which must react on their mixing on terms of equality. Underneath there is often personal rivalry or jeolousy between

States which must also work against any union. In the face of these discordant elements, if there is anything which usually unites parties together, it is a broad political programme based on common interests. There must be community of interest and community of ideal. The only danger, which could have united the States, is that of the encroachments of the undefined and undefinable paramountcy on the internal autonomy of the States. That is the only danger which is common to all the States and could have become the strongest incentive for a coherent party. Coalitions for aggression are out of question and the only coalition they can have is for self-preservation. But this question of self-preservation from the inroads of paramountcy is outside the scope of the Federation ; that is still within the reserved enclosures of the Representative of the Crown. Moreover, an examination of the list of federal subjects reveals that there is no subject which would involve the special interest of the States as such, and which they have not already safeguarded by their Instruments of Accession, as contra-distinguished from that of British India. Thus the main conditions for the formation of a united party being absent, the States representatives are not likely to form a single group in the sense in which political parties are commonly organised. On the contrary, scattered as they are over the whole of India, their interests will be more in common with their neighbouring British Indian Provinces, than with their sister States separated by the width of a whole continent. It is, therefore, more probable that for the protection of their economic interests or further advancement of their social institutions, the States representatives will join hands with the representatives from the neighbouring British provinces rather than with their colleagues from other States differently situated. But even in the event of their cooperating with the British Indian representatives, it is not likely that they will join a formal party. Membership of a political party, connotes party loyalty, party discipline

and strict obedience to the party whip. By the very nature of their selection, the States representatives cannot be free agents. In the first place, the stand that they can take up in the Legislature must inevitably depend on the views of the Rulers whom they represent. Secondly, and this is perhaps the most important reason, although the existence of a drilled battalion of the States representatives, as the old official bloc in new garments, is an obvious impossibility, that occasions may sometimes arise wherein some political pressure or some friendly advice may be brought to bear upon these representatives from behind the curtain, is a contigency not beyond comprehension. The same process, which could create political usages against the express terms of the treaties, can create political conventions against the terms of parliamentary pratice. Thus by the reason of their inherent diversity in interests and the absence of the only motive which could possibly have bound them together and, in addition, the peculiar relationship between the States and the paramount power, the representatives of the States will neither form a strong party of their own nor will they absorb themselves in other parties formed on regional, political or even communal considerations. They will be like a broken necklace with pearls strewn all over the floor of the Federal Legislature.

*The States Representatives—Substitute for the Official Bloc?* :—A question which can be conveniently discussed at this stage is the one which is so prominently put forward by the critics of the Federation scheme. It is emphatically asserted by these critics that the introduction of the States on the stage of the Indian Legislature is merely the substitution for the official bloc in the old legislature and that while the official bloc followed blindly but openly the government leader, this new form will dance to the tune of the stage director behind the curtain and at the same time exhibit apparent independence.

This description of the representatives who will be deputed by the States is certainly unjust. As already pointed out, there are possibilities of an occasional interference with the independence of the States representatives but such occasions will necessarily be very few and can hardly justify a total condemnation of these representatives. In actual practice, the States representatives in the legislature are likely to show an appreciable degree of independence. As pointed out by Mr. J. H. Morgan, K. C., a great authority on constitutional law, " such a description of the many distinguished statesmen who will represent the States is entirely misplaced. Indeed, I venture to think that these statesmen are likely to display quite as much independence as any Congress nominee tied hand and foot to the party caucus ". (*The Times*, London, March 17, 1938). In his memorandum submitted to the Joint Parliamentary Committee, Sir Tej Bahadur Sapru characterises this description of the States representatives as the new form of the official bloc, as highly unjustifiable. (*Records of the Joint Parliamentary Committee*, Vol. III, P. 248).

*The Representatives of the States—Election Vs. Nomination* :—The greatest factor which must determine the position of the States in the Federal Legislature is the manner by which their representatives step into the Legislature or in other words whether they will be the nominees of the Ruler bound to vote according to his dictation or whether they will be elected representatives of the subjects of the States who may or may not vote as the Ruler of the State wishes them to do. This question has been the topic of discussion, both in India and in England, since the publication of the scheme of the Federation or even before that. Efforts were made at the Round Table Conferences to get the States agree to a certain representation to their subjects. In its third report to the Conference, the Federal Structure Committee said : " While the Committee remain of opinion that this question must be left to the decision

of the States, it cannot be contended that it is one of no concern to the Federation as a whole. They note the assurance of certain individual members of the States delegation that, in those States which possess representative institutions and for which these members were in a position to speak, arrangements will be made which will give these bodies a voice in the Ruler's selection. The Committee as a whole are prepared to leave this matter to the judgment of the States". (*Proceedings of the Second Round Table Conference*, p. 20). Appeals were made to the sentiment of the Princes to depute the elected representatives of the subjects. The Princes, strongly and courageously, refused to give any such undertaking and adhered to their right of exercising their freedom in selecting their representatives. This question of the selection of State representatives is, at the present moment, being very hotly debated, especially after the introduction of provincial autonomy in April 1937. To some, the union of elected representatives of British India and the nominated representatives of States is theoretically unsound. To others it appears to present practical difficulties in the working of the legislature because of the presence of two disparate elements. This view is strongly advocated, not only by British Indian politicians, but by English statesmen like Lord Lothian and Lord Samuel, who recently visited India. The whole sum and substance of the discussion is that the representatives of the States should be elected by the subjects and should not be mere 'palace nominees'. The latest suggestion to that effect comes from no less an authority than the Secretary of State for India, Lord Zetland. At the annual Bombay Dinner in London, Lord Zetland is reported to have said that "he could understand the views of those who would represent the provinces in the Federation, as a result of election, that some element of popular choice, as distinct from nomination, should enter into the selection of State representatives. Well, that was for the Princes themselves to decide. There was nothing in the

Act to prevent it, nor would the Paramount Power be found standing in the way of any Prince who sought to temper the rigid autocracy of bygone days with a more liberal system". (*The Times*, London, May 28, 1938). As this problem has been the bone of contention in the whole Act and as the whole nature of State representation, if not the future of the States themselves, depends upon the solution of this problem, it deserves more detailed consideration.

*Position of Representatives in other Federal Unions* :—We begin the examination of this question from a theoretical point of view in the light of data supplied by some of the leading federal constitutions. We consider whether there is anything in the nomination of representatives which is repugnant to the federal form. In the United States, for example, the members representing the several States in the Senate were deputed by the States and not directly elected by the people for more than a century before 1913 when direct election was substituted and "there was and still is a disposition in some minds to regard them somewhat as ambassadors accredited by the States to the National Government". (GARNER—*Political Science and Government*, P. 671). But even after the introduction of direct election by the people, the method of election has been left practically to the States themselves subject to the general directions of the Constitution. Similarly in the Swiss Republic, the choice of representatives is left fully to the cantons who have their own rules of selection and although the majority of the cantons have introduced direct popular election, seven of them still send representatives elected by the cantonal legislatures and not by the people directly. The Constitution of Imperial Germany affords even a better illustration. As described by President Wilson : "In form, in theory and indeed in fact, the Bundesrath was a body of ambassadors. Its members represented the governments of the States from which they came and were accredited to the Emperor as diplomatic agents, pleni-

potentiary charges d'affaires, to whom he must extend the same protection as was extended to like representatives of foreign States", and these members "were sent and withdrawn at the pleasure of their respective governments". (*The State*—P. 448). The principle that the members at least in one chamber, should represent the governments of the units appears to have been so fully appreciated in Germany that even after the overthrow of the Imperial administration, this principle found its way into the composition of the Reichsrath under the Weimar Constitution. There is a distinct provision in the Constitution of Republican Germany that the representatives of the Länder in the upper Chamber must be members of the Cabinet of that Länder. As regards the composition of the lower chambers, there is, of course, a general uniformity in all federal legislatures. But, as observed already, a distinction must be made between the position of units which are republican and which are therefore, ultimately subject to the sovereignty of the people and that of States which are monarchical and which know of no other sovereignty but that of the Ruler. Turning again to the illustration of the States in Imperial Germany, although their representatives to the Reichstag were elected by the people, they mattered very little in the politics of the Empire as the Reichstag occupied a position completely subservient to the Bundesrath. Two broad principles can be deduced from this analysis. In the composition of the Federal legislature, one of the chambers should represent the States or units as such or their governments and the other should represent the ultimate sovereign authority in the States. It is, therefore, pre-eminently logical that in the case of an Indian State, the Ruler who is both the actual government and the ultimate sovereign of the State, should have a free choice in the selection of his representatives to both the chambers of the Indian legislature.

*The Legal Position of State Subjects* :—A question which naturally follows this discussion is : 'Have the subjects of the

States no legal status which would enable them to demand representation?' The answer is clearly 'no'. The very theory of monarchy is that the monarch is the fountain of all legislative, judicial and executive powers of the State. The sovereignty of the State resides in him and his subjects have no separate existence apart from him. This principle has been recognised not only in India but had been so recognised even in Germany where the German Empire was the federation of Princes and free cities. The boast attributed to Louis XIV, "L'Etat c'est moi" (I am the State) is, in the case of Indian States, a completely legal truth, however unpalatable it may be to modern advocates of democratic government. The Government of India Act recognises this principle and has made the Prince solely responsible for the entry of his State into Federation as also for the proper execution of federal mandates. It was on this very principle that the subjects of the States were not given a hearing by the Indian States Committee in 1928 and it was again on the same ground that the subjects of Indian States were excluded from participation at the Round Table Conferences in connection with political reform in India. Mr. Bhulabhai Desai, the famous advocate and the leader of the Congress party, also expressed his opinion that the position of an Indian State, according to International law, was that of a monarchical State, where the Ruler was a despot in the Greek sense, the source of all power and authority, whose will was law. In this view only the Prince could represent the State as a unit of the Federation in a strictly legal sense. (*Round Table*, Vol. XXV, P. 762).

*Demand for election of State Representatives* :—Coming to the practical aspect of this question of the representatives of the States in the Federal Legislature, we find that there are two bodies at present, which demand the election of these representatives by the subjects. The one is that of the British Indian politicians headed by the Indian National Congress which

is agitating to secure the election of representatives of the States. This agitation has received a great stimulus by the presence of Congress ministers in seven out of eleven provinces in British India. The opposition of the Congress to the Federal scheme and the position of importance which it holds in the provinces has made the prospects of the successful inauguration of the Federation rather gloomy and has, to a certain extent, induced men like Lord Lothian, who was one of the framers of the scheme, to support the demand of the Congress for popular election of State representatives. The other body is that of the subjects of the States themselves.

*The Congress and State Representatives* :—The Indian National Congress has, in the press and from the platform, denounced the Government of India Act. Responsible leaders of the Congress have more than once declared that Congress is not opposed to any and every kind of federation. It is opposed to the nomination of representatives by the Rulers of the States and who will, therefore, be bound to be obedient to the commands of such Rulers. It has made no secret of the fact that it is unable to countenance the existence, side by side, of an elected representative and a nominee of autocracy. The resolution relating to the Federation Scheme passed by the Congress, at its session at Haripura in 1938, bears testimony to this complaint. The reason of all this agitation is obvious. One can never be persuaded to believe that this insistence of Congress on the popular election of State representatives is based upon a genuine desire on the part of that body to ameliorate the condition of the subjects of the States. On the other hand, it has been the declared policy of the Congress, consistently and studiously followed during the last half a century and reiterated at the session at Haripura, to leave the States alone. In spite of the utterances of some congressmen and in spite of the boast of Sardar Vallabhbhai Patel, ex-President of the Congress and President of its Parliamentary

board, that "We fight for the freedom of Indian Princes also", (Speech at Bangalore—*Madras Mail*, May 9, 1938), it remains a fact that Congress has never fought for the subjects of the States and much less for their Rulers. The reason for this solicitude for the State subjects must be found in something else. It is evident that the Federal Legislature, as at present constituted, will make it impossible for any single party to form a stable ministry. If the representatives of the States are elected by the subjects, Congress, or for the matter of that, any party, can hope to get some additional strength from among the State representatives. The strong organisation of the Congress and its effective propaganda through the press and the platform, coupled with the total absence of any effective press and party organisation to support the Rulers, lend support to this view. It is only in this light that the change of attitude of British Indian politicians can be interpreted.

*The State Subjects and election of Representatives* :—The attitude of the leaders of the subjects of Indian States is, however, quite unintelligible. Looking to the development of representative institutions in the States where, in most of them, even the rudiments of municipal popular government do not exist, it is certainly hazardous for the leaders of the subjects to claim the right of electing their representatives to the Federal Legislature. Instead of concentrating their attention on the gradual development of democratic institutions within the States, which in the end must give them a voice in the Federal Legislature itself, the leaders of State subjects are diverting their energies to the realisation of those powers which by their very nature cannot be realised at this stage of the political development of the States. It is claimed by these protagonists of election that if the State puts its faith on the elected representatives of the subjects, they will also prove true to that faith. It is needless to discuss the truth or otherwise of this contention. Two reasons appear to be quite evident at the root of this agitation.

One reason might be the desire for securing representation for the sake of representation, an imitation of British India and no special attention need be paid to this. But the other possible reason, which is most subtle and at the same time one against which the States must guard, is the opportunity that such an election will present to the disgruntled representative to hang his grievances on the portals of an All-India body. It will only serve to invest the agitator with a bowl in which to wash dirty linen in public or to exhibit the sorry spectacle of a house divided against itself. If this possibility is denied and if the elected representatives of the States are expected to reflect the sentiments of the Ruler, one is irresistibly reminded of the famous anecdote attributed to Khalif Omar when he permitted the destruction of the Library at Alexandria, "If the books agree with the Koran, they are not needed. If they differ they ought to perish". (Bryce—*Modern Democracies* Vol. II, p. 438). If the elected representatives are expected in each case to vote according to the directions of the Ruler, a trained administrator having practical experience will be more useful. If they are likely to vote against the directions of the Ruler, they are likely to be a source of danger to the Ruler himself so long as the peculiar political relationship exists.

*The Dangers of Election of State Representatives* :—The election of the representatives of the States directly by the people opens out possibilities in the future to which the States cannot be blind. Some of them may even jeopardise not only the safety but the very existence of the State itself. It is an acknowledged fact that the political agitation in British India has so far been confined to that part ; the States have been scrupulously left alone. The Indian National Congress has avoided all interference with the States while the States, on their part, have never meddled with affairs in British India. A striking instance of this is furnished by the attitude of strict neutrality and impartiality which the States maintained under the most trying

circumstances, during the last civil disobedience movement, a fact to which even the most ardent congressman will bear testimony. But the introduction of election for the Federal Legislature will naturally induce the Congress, or any other political party in British India, to spread the net of its political agitation within the borders of the States in the hope of getting some prizes. This will mean the importation of the methods of political agitation current in British India with their inevitable paraphernalia of communal jealousies and communal warfare, the burgeoisie versus the proletariat, the capitalist versus the communist, maladies from which the States are singularly free to-day. While admitting that the States cannot erect a Chinese wall against the infiltration of democratic ideas across their borders, they cannot afford to forget that if fire at a distance gives warmth and is invigorating, fire too close at hand is dangerous and destructive.

*The Creed of Independence and State Representatives* :— A still greater danger, which the States must anticipate, arises from the wide gulf which exists between the ideals of the Indian National Congress and the States. The Congress is wedded to the creed of Indian independence and the radical element in it is anxious to break off all connection with England. Even the moderate element in the Congress, led by Mahatma Gandhi, has the ideal of Swaraj within the Empire, if possible, and without the Empire, if necessary. The States, on the contrary, have always insisted upon their profound loyalty and devotion to the Crown and upon the maintenance of the British connection. This position was clearly explained by H. H. the Maharaja of Bikaner at the First Round Table Conference. His Highness said : " We are here to present the policies of the Indian States. First and foremost in those policies is an unflinching and unqualified loyalty to the Throne and Person of H. M. the King-Emperor of India. With the traditions of centuries of Kingship, and with the instincts and responsibilities

of hereditary rule ingrained in our being, the Kingly idea and the monarchical system are bone of our bone, flesh of our flesh. Even if we were tempted to weaken from this principle—which is impossible—the thought of the intense devotion of the Imperial House of Windsor to the interests of India would rekindle our faith". (*Proceedings of the First Round Table Conference*, P. 34). With such a wide divergence between the ideals of these two bodies and with the peculiar position of the Prince in India, who is expected to fulfil certain 'obligations to the British Government', is it possible to bring about a synthesis of aims between the representatives of the Congress and those of the States? Those who are acquainted with the conditions in the States will agree that if representatives of States are elected on a popular basis, the majority of them will side with the Congress and even accept the radical creed of independence. Congress has made no secret of the fact that if the present delicate international situation takes a turn for the worse, it is not going to co-operate with the British Government. What the position of the Ruler will be, if in such vital cases his own representatives were to go against the interests of the State, can be better imagined than described. On the one hand, there will be the possibility of a strong public opinion favourable to the Congress and inimical to the British Government and on the other hand, there will be the irresistible pressure of Paramountcy and the Ruler will find himself in a perplexing situation. He will find himself placed dangerously between Scylla and Charybdis making it impossible for him wisely to steer the ship of State. The vessel must founder either on the rock of popular opinion or on the rock of Paramountcy. In either case, the consequences cannot but be serious to him, leading, in extreme cases, even to abdication either on the score of inability to rule or on the ground of failure to fulfil the obligations to the British Government. By divesting his authority with regard to the Federation into the hands of elected representa-

tives, who may quite likely be beyond his control, the Ruler is likely to find himself in the embarrassing position of serving two masters with conflicting interests.

*The Need for Caution.*—All these are extreme cases, no doubt, but they cannot be ignored simply because they are highly improbable or too remote. A politician is not worthy of the name if he is not able to anticipate the consequences of his policy and every such policy must be tested on the touch-stone of such extreme, but not impossible, consequences. He must think ten times before he takes a step because he must realise and remember that retreat in this case is beyond possibility. He cannot make the State repent for its decision to join the Federation. In an outspoken and frank address to the Travancore Legislative Council recently Sir C. P. Ramaswamy, the Dewan of Travancore, indicated the problems that might arise if under responsible government, the representatives of the States in the Indian Federal Legislature were beyond the control of the Maharaja and combined against the interests of the paramount power. (*Report in the Times of India*, February 5, 1938, p. 8). There is evidently a supreme necessity of caution in such cases and in the present state of political affairs in British India, the development of the subjects of the states and the peculiar and mysterious relationship of the States with the Paramount Power, election of State representatives by the people, in the real sense, is not merely undesirable and inimical to the interests of the Rulers but positively suicidal.

*The Period of Membership and Absence of Recall.*—Apart from the risk in introducing real election of representatives discussed above, the Rulers of States must take special precautions even in nominating their representatives. A member elected to the House of Assembly continues for five years and one elected to the Council of State for nine years. These pe-

riods are really too long and whatever the justification in the case of members who enter the legislature by election, there is absolutely no reason why such a long period, or any period at all, should be fixed in the case of nominated members. The general principle in keeping fixed tenures of life for the legislature is to keep it thoroughly representative of the electors. That is also the reason why they are of moderate duration. But there seems to be no reason why members who are nominated by a corporate body or the State should have any fixed tenure. Neither in the Bundesrath of Imperial Germany nor in the Reichsrath of Republican Germany is there any period fixed for the members who are the nominees or agents of the State governments. There is absolutely no risk of incessant changes being made in the personnel of the legislature, as in the first place, it is not at all in the interest of a State to change every time an experienced representative for a new one and secondly, if there is such a tendency, it can be checked by appropriate internal regulations for admission of members. However, the Act prescribes five and nine years respectively for the House of Assembly and the Council of State and these are applicable to representatives of States also. Moreover, unlike the practice in Germany, the States appear to have no right to recall their representatives. At least there is no provision to that effect in the Government of Indian Act. On the contrary, in the absence of any specific provision the presumption is that the representatives of the States enjoy the same privileges as other members even in the matter of tenure. About this question of recall, the Joint Parliamentary Committee says : " We conceive that a State representative, although he is nominated and not elected, holds his seat precisely on the same tenure as an elected representative from British India, and no distinction should be made between the two". (*Report*, Para, 210). This is also the view of Sir Shafa'at Ahmedkhan who says, " The States made it perfectly clear that they reserved complete liberty to select such

persons as would, in their opinion, represent the States with integrity and ability. Some of them went further and claimed the right on behalf of their Rulers to revoke the nomination of their representatives to the Legislature if the latter were called upon to resign by notice in writing from their Ruler. Such a right would have reduced the Federal legislature to a farce and was rightly rejected by the Joint Select Committee." (*The Indian Federation*, p. 314). On the other hand, constitutional writers like Sir A. B. Keith are of opinion that a State representative can be recalled. "The State representatives are appointed by their rulers, and though appointed for definite periods of time, the power of resignation could no doubt be insisted on by any ruler who desired to change his nominee". (KEITH—*Constitutional History of India*, p. 339). There is, therefore, no doubt that the Act has established an ambiguity in this question and the States ought to get it cleared by their Instruments of Accession. But if it is decided that no right of recall exists, there is the greater necessity of caution on the part of the States in nominating their representatives. If due precaution is not taken, occasions may arise when a Ruler will have the misfortune to see with a pathetic look and a broken heart his own representative voting against his interests and yet safe out of his control. In the absence of any power of revoking the nomination, one cannot imagine whether, even a State official, nominated by the Ruler but subsequently resigning his service under the Ruler but not resigning his membership of the Legislature, will continue to represent the Ruler. In short, the length of tenure and the absence of any right of recall deserve to be seriously remembered by the Ruler in nominating his representatives.

*State Representatives and Communalism* :—One more consideration, which the States must bear in mind in the selection of their representatives, is the danger of communalism. Efforts were made at the Round Table Conferences to persuade the

Princes to promise that their representatives will contain a fair representation of the muslim community. The muslim community has secured statutorily 33 per cent. of the seats allotted to British India in the Central Legislature. They desired to have a similar assurance from the States to secure the same proportion among the State representatives. The States consistently refused to bring in any communal considerations in the selection of their members as they had never discriminated between their Hindu and Mohamedan subjects. They stated that the communal problem did not exist in the States at all and that all communities had equal rights. This claim of the States for complete immunity from communal troubles is testified by an independent authority like Mr. J. H. Morgan, K. C., who recently travelled in India. Mr. Morgan says, "What I did find was no terrorism and no communal strife. As to the almost complete immunity of the States of these two scourges of the political life of British India, there can be no doubt. Why? I put that question to one of the Princes. His answer was, 'because there are no politicians with jobs in their gift in my State; no appointment can be made without my approval and, in approving it, I make no distinction between Muslim and Hindu". (*The Times*, London, March 17, 1938). Communalism which has been the worst feature of British Indian politics has been conspicuous by its absence in Indian States and the States must boldly refuse to be guided by any such considerations in spite of the pressure of communal agitation or other influence. The danger of such a pressure, coming by way of 'advice' is not entirely unlikely and there are publicists in India who believe that in view of the attitude of the Indian National Congress towards the Federation, the Paramount Power may bring some pressure to bear upon the States to nominate a fairly large number of Muslim representatives to placate the Muslim opinion in British India. (*Modern Review*—Calcutta, January 1938). It is interesting to see how

Muslim communal leaders expect the States to nominate muslims. Look to the logic of Sir Shafa'at Ahmedkhan, former President of the All India Muslim Conference, who says, " some of the representatives of the Indian States in the Federal legislature will be muslim, and States like Hyderabad and Kashmir, the former as ruled by a follower of Islam and the latter as predominantly muslim, are bound to send many muslims " ; but Sir Shafa'at wails that " they will be bound by the instructions of such States and will be servants of these States and not representatives of the Muslim Community ". (*The Indian Federation* P. 314). The States must, therefore, nominate representatives who will represent them with integrity and ability without narrow considerations of communal interests and must not recognise the necessity of representation on communal lines. It is only in this way that they can secure efficiency without creating discordant elements among the different communities in the States.

*Servants of the Crown and State Representatives* :—A further point deserves to be noticed incidentally. Under section 26 of the Government of India Act, 1935, a person who holds any office of profit under the crown is disqualified from membership of the Legislature. But an exception has been provided for. A person is not to be deemed to hold an office of profit under the Crown in India by reason only that while serving a State, he remains a member of one of the services of the Crown in India and retains all or any of his rights as such. Innocent as this provision appears to be, it is replete with possibilities which in the long run must react upon the independence of the State representatives and also upon the general tone of the Legislature. On account of the paucity of efficient administrators in the State, a State has sometimes to borrow the services of experienced Government servants from British India. On the other hand, as stated by Sardar K. M. Panikkar, " in more recent times the policy of the Government has been, al-

most invariably, to 'lend' British officials as Dewans, who naturally have their eyes on promotions in British India, and on reward in the form of British honours, and are inclined to look on the maintenance of British rights, and the furtherance of European interests as their first duty." (Quoted in *The Evolution of the Indian Constitution* by K. B. Ramasubramanyam). During the course of their service in the State, however, they are fully the servants of the Ruler and are technically not in the service of the Crown for the time being. One can understand an exception being made in such cases. But under the present section, even the servants of the Crown who retain their powers fully as British servants become eligible for membership of the legislature if they also serve a State. In the case of bigger States there will be no difficulty since they can find enough efficient persons to represent them. But in the case of smaller States who have been grouped together there is every likelihood of a tendency, arising or being created, to nominate a British official to represent them in view of economic considerations or to resolve differences of opinion which are bound to arise in the matter of selection of representatives among the members of the group. In this way Government officials can secure admittance into the Legislatures through the Indian States and one is not, perhaps, unjustified in interpreting the inclusion of this provision in the Act as a device to introduce an official element in the Legislature, if not by the front door of direct nomination as in the old days, then by the back door of nomination by the States. Taking an extreme case, suppose some States were to nominate the Political Secretary to the Government of India as its representative. Undoubtedly, so far as the States representatives are concerned, the Political Secretary within the Legislature will be far more of a force than when he is outside it. The same objection which was formerly raised to the Governor-General and the Provincial Satraps presiding over their legislatures, can be raised against

the presence of the Political Secretary in the ranks of State representatives. Although it is extremely doubtful how far any State can resist an offer of services of British officials, should it be made, the possible effects of such appointments on the general influence of the States in the Federal Legislature cannot escape the attention of a serious student of the Government of India Act.

*Election of State Representatives—When Advisable?* :— The discussion in the preceding pages of the position of the States in the Federal Legislature and the precautions essential in the selection of their representatives, leads naturally to two questions : (1) Are the subjects of States to be permanently excluded from having any voice in the Federal Legislature? and (2) What are the essential qualities of a representative of the States? The answer to the first question is 'no'. On theoretical grounds, it is dangerous to the integrity of the State to make a distinction between the Ruler and his subjects. In the eyes of the world outside, both must appear as a single political entity. Also, as a general rule, representatives should represent the governments of the States and so long as the Ruler is personally responsible for the government, his representatives must be of his choice. Under the existing political relationship between the States and the Paramount Power, the Ruler has to fulfil certain obligations to the British Government and so long as these obligations last, he cannot possibly depute any other persons than those in whom he can place implicit faith to uphold his authority. When representative institutions in the State progress to the establishment of real responsible government, the Ruler becoming a constitutional monarch like the King in England, election of state representatives, who will naturally reflect the views of the government of the State, will be possible. Till this stage is reached, there can be no election, unless such election is a hypocrisy. Progress must be made from within and any attempt to introduce the

principles of popular election with regard to the Federal Legislature before the transfer of internal responsibility from the Ruler to his subjects is putting the cart before the horse.

*Qualifications for the Representative of a State* :—We consider now the second question concerning the qualifications which the representative of a State must possess to enable him to play his proper part in the Indian Legislature. An indication of what type of persons should represent the States has been given by Prof. L. F. Rushbrook Williams, while replying to the criticism of the Congress regarding the nomination of State representatives by the Rulers. Prof. Williams, who possesses an intimate knowledge of the States, says : " After all, is not the attitude of Congress somewhat academic? Would it really matter if men of the calibre of Sir Akbar Hydari, Sir Mirza Ismail, Sir V. T. Krishnamachari or Sir K. N. Haksar were nominated or were elected? ". (*The Times*, London, March 11, 1938). The part that such a representative will play has been admirably described by the Rt. Hon. J. C. C. Davidson, thus : " The States' wealth is not only material but cultural and one of the most important attributes which the State representatives will bring to the assistance of the Federal Legislatures will be an intimate and practical knowledge of the art of government. The representatives of the Indian States may share with their colleagues from British India enthusiasm for a particular policy, but, what is more important, they will possess practical knowledge of the administrative reactions of policy upon the people. Their counsel and advice may be of the greatest value to those British Indians who may be possessed of burning ideals and a desire to improve the lot of their fellow citizens, but who may not have had the experience of administration upon which the States' representatives can draw ". (*The Near East and India* —November 29, 1934). The States' representative must be, therefore, an astute politician and a skilled administrator who can rise above the petty conceptions of territorial or communal

bigotry and can have a broad and national vision. He must possess a scientific and practical knowledge of the technique and art of national and international politics, the teachings of which he can bring to bear upon the solution of the intricate problems which may confront him. A complete mastery of the details of administration alone cannot make a successful legislator. He must be a past master in the art of debate and persuasion, and above all, must possess that quality so essential in a legislator, namely the capacity of adjusting his differences with his fellow legislators or what is known as 'give and take'. While remaining alert to his duty and loyalty to his master, he must bring about a synthesis of State and national interests to the advantage of both. In short, by an admirable combination of theoretical knowledge and administrative skill, eloquence and persuasion, he must create respect for and confidence in himself among his colleagues. With even the statutory minority in the Federal Legislature, a few such representatives will enable the States to maintain their prestige and have their impress upon the course of Federal legislation. A single luminary in a legislative chamber can undoubtedly wield a far more powerful influence than a pack of back-benchers can ever do.

## CHAPTER V.

### THE INDIAN STATES AND FEDERAL ADMINISTRATION

*Introduction* :—In the last chapter we studied the position of the Indian States in their relations with the Federal Legislature and the extent to which the States can influence the course of legislation in the Federation. We now proceed to discuss the relations between the States and the Federal Executive and Administration with a view to analyse the part that the States will play in the formation of the Federal Executive and consequently in shaping the policy of the Federal Government and also the extent or scope of Federal authority within the borders of the States. We shall also discuss the possible effects of this extension of Federal authority upon the internal administration of the States themselves.

*Constitutional Provisions.*—(*a*) The Governor-General : The executive power and authority of the Federation is vested in the Governor-General of India as the representative of the King. The Governor-General is appointed by His Majesty by a Commission under the Royal Sign Manual and has (1) all such powers and duties as are conferred on him by or under the Act and (2) such other powers of His Majesty, not being powers connected with the exercise of the functions of the Crown in its relations with Indian States, as His Majesty may be pleas-

ed to assign to him. To each Governor-General the Crown will issue an Instrument of Instructions containing directions as to the way in which his functions are to be exercised. All executive action of the Federal Government is to be taken in his name.

(*b*) Executive authority in relation to the States : The constitution provides that in relation to a State which is a member of the Federation, executive authority will extend only to such matters as the Ruler has accepted as falling within the Federal sphere by his Instrument of Accession. The executive authority of a Ruler of a federated State is, however, to continue to be exercisable in relation to matters with respect to which the Federal Legislature has power to make laws for that State. This provision is not to apply when the executive authority of the Federation becomes exercisable in the State to the exclusion of the executive authority of the Ruler by virtue of a Federal law. In the exercise of executive authority of the Federation in any State, regard is to be had to the interests of the State concerned. It is one of the special responsibilities of the Governor-General to protect the rights of any Indian State and the rights and dignity of the Ruler thereof, in the exercise of his executive authority.

(*c*) The method of Federal execution within the States : The Federal Legislature has power to enact legislation in Federal subjects which will have the force of law in every province and subject to such reservations as may be contained in the Ruler's Instrument of Accession, in every State which is a member of the Federation. The administration and execution of these laws are vested in the Federation itself and in Federal officers. But the Governor-General may with the consent of the government of a Province or the Ruler of a Federated State entrust, either conditionally or unconditionally, to that government or the Ruler, functions in relation to any matter to which the executive authority of the Federation extends. If the local

administration is entrusted unconditionally to the Ruler, his officials alone will apply the laws in the State, and they will be under his control, subject only to following the instructions issued by the Federal Government. Secondly, the Federal Legislature may by its Act impose duties and confer powers on a Ruler or officers designated by him in respect of federal matters. The Act of the Legislature may withdraw the officers designated by the Ruler from his control and authority and place them entirely under the authority of the Federal Government. Where powers have been so conferred and duties so imposed on a Federated State or its officers, the Federation will pay to the State any extra cost of administration incurred by the State in connection with the exercise of those powers and duties. In default of agreement the sum to be paid in each case will be fixed by an arbitrator appointed by the Chief Justice of India. It is also provided that, notwithstanding anything in the Act, agreements may, and if provision has been made in the Instrument of Accession shall, be made between the Governor-General and the Ruler for the exercise by the Ruler or his officers of functions in relation to the administration in his State of any law of the Federal Legislature which applies therein. Any such agreement will contain provisions enabling the Governor-General to satisfy himself, by inspection or otherwise, that the administration of the law to which the agreement relates is carried out according to the policy of the Federal Government, and, if he is not so satisfied, the Governor-General in his discretion may issue such directions to the Ruler as he thinks fit. Such agreements shall receive judicial notice.

(*d*) Exercise of authority of the State : The executive authority of the State shall be so exercised as not to impede or prejudice the exercise of Federal authority under any law. The question of the existence of such Federal authority will be settled on the motion of the Federation or of the Ruler by the Federal Court in exercise of its original jurisdiction. If the

Governor-General is not satisfied with the executive action of the State, he may in his discretion, after considering the representations of the Ruler on the subject, issue necessary instructions or directions to the Ruler.

*Composition of the Federal Ministry* :—The Governor-General shall have a Council of Ministers, not exceeding ten in number, to aid and advise him in the exercise of his functions outside the 'reserved' sphere. The Ministers will be chosen by him and will hold office during his pleasure. The Act does not mention how the ministers will be selected but the necessary suggestion has been made in the Instrument of Instructions issued to the Governor-General by His Majesty. "In making appointments to his Council of Ministers, Our Governor-General shall use his best endeavours to select his Ministers in the following manner, that is to say, in consultation with the person who, in his judgment, is most likely to command a stable majority in the Legislature, to appoint those persons, including so far as practicable, representatives of the Federated States and members of important minority communities, who will best be in a position collectively to command the confidence of the Legislature. But, in so acting, he shall bear constantly in mind the need for fostering a sense of joint responsibility among his Ministers". (*Par. VIII of the Instrument of Instructions*). Thus the Federal Ministry will work on the principle of joint responsibility but looking to the nature of its composition one wonders how joint responsibility can be achieved. According to the directions of the Instrument of Instructions, the ministry will include members of the minority communities and the representatives of the States. Under the parliamentary system, the ministry is usually composed of members of the same party and having the same programme of work. Coalitions are, of course, possible but they must be also the result of mutual understanding between the parties concerned and as such a coalition means the forma-

tion of a single party during the period that the coalition lasts. But, unlike any constitution or constitutional practice, the Governor-General in India is instructed to include in his ministry members of those groups or parties whose aims or ideals may not be even compatible with those of the majority party, the leader of which is called upon to form the ministry. There being thus the possibility of the existence of divergent opinions in the ministry, one does not know how far the Governor-General can succeed in fostering a sense of joint responsibilty among his ministers. In rejecting the proposal for the insertion of a definite direction, to the provincial Governors to introduce the principle of collective responsibility, in the Instrument of Instructions, the Joint Parliamentary Committee remarked : " This seems to us to confuse cause and effect. The collective responsibility of ministers to the Legislature is not a rule of law to be put into operation at discretion, but a constitutional convention which only usage and practice can define or enforce ; and since that convention is the outcome and not the cause of ministerial solidarity, it is as likely to be hindered as helped by artificial devices which take no account of the realities of the situation". (*Report*, Para. 113). If the Joint Parliamentary Committee could not recommend this principle to be definitely inserted in the Instrument for the Provincial ministries, there is a still greater reason why such a principle cannot work in the Federal Ministry which will contain a fair proportion of States representatives who are not likely to be free agents. The usual course in the matter of States representatives will be, not that they will guide the policy of the States according to the general trend of Federal ministry but that they will be themselves required to sponsor the policy which their States will advocate. Under these circumstances collective responsibility cannot be obtained and if it is insisted upon the ministry will be unstable and short lived like the French ministries.

*The Executive may follow Swiss Model.*—The composi-

tion of the Legislature, containing representatives of various religious communities and other interests besides the States representatives, makes it impossible to have a ministry composed of members belonging to the same party. It is natural that every group in the Legislature which can claim to have sufficient strength will expect a place in the ministry. The ministry, in such a case, can secure stability only if it conforms to the Swiss model by becoming a mere committee of the Legislature bound to follow the dictates of that body. This possibility was envisaged by the Joint Parliamentary Committee. "There will, therefore, be centripetal as well as centrifugal forces; and it seems to us indeed conceivable that until the advent of a new and hitherto unknown alignment of parties, a central Executive such as we have described may even come to function, as we believe that the Executive of the Swiss Confederation functions, as a kind of business committee of the Legislature." (*Report*, § *192*). But in spite of these expectations of the Joint Parliamentary Committee, the Governor-General has been instructed to foster a sense of joint responsibility.

*The States Representatives and the Formation of the Ministry* :—The question we now consider is whether it is possible for the representatives of the States to form a minstry of their own. As we have already noticed, the States representatives are not likely to form a strong and united party in the Legislature and so the chances of these representatives forming a ministry are very remote. Even supposing that they succeed in having a strong party, there is no likelihood of their having a ministry exclusively composed of representatives from the States because of the statutory minority in the Legislature which gives them only 36 per cent. of the total membership. The only alternative course left open to the States is to form a strong group themselves and to form a ministry in coalition with some other party in the Legislature and so command a majority in the Houses. If they succeed in doing so, they will certainly

improbable. The stability of the executive and the equipoise of different interests within it can best be secured by the formation of the executive on the plan of the Federal Council in Switzerland.

*The Governor-General and the Representative of the Crown.*—The executive authority of the Federation is vested in the Governor-General and all executive action is to be taken in his name. So far as the States are concerned, this executive authority extends only to such matters as the Rulers have accepted by their Instruments of Accession as falling within the Federal sphere. For all other matters, the States are independent, subject to the exercise of the rights of Paramountcy by the Crown. These rights of Paramountcy will now be exercised not by the Governor-General, who becomes a purely federal official, but by the Representative of the Crown who is independent of the Federation and who is concerned with performing all the duties of the Crown in relation to the States which do not fall within the ambit of the Federation. During the course of constitutional discussions the States insisted that the matters connected with the exercise of Paramountcy by the Crown should be definitely excluded from the field of Federal activities to safeguard their interests against encroachments on their rights and privileges by the Federal Government. The offices of the Governor-General and the Viceroy or the Representative of the Crown have been bifurcated to meet the wishes of the Princes but, in practice, the bifurcation is nominal as the two offices have been amalgamated into the person of a single individual. Although the States have received protection from the Federation by the exclusion of the questions of Paramountcy from the Federal sphere, Federal influence is not likely to be obliterated from this field because of the inevitable influence of the Federal ministry upon the Governor-General who is also the Representative of the Crown. The fusion of the two offices, therefore, minimises the importance of the theoretical division

and means that the States can get adequate protection against the encroachments of the Federal Government only where the Governor-General does not see eye to eye with the Federal Ministry. But in matters in which the Governor-General concurs with the Federal Ministry, he is quite likely to use his influence within the State, if not as Governor-General, as the Representative of the Crown on grounds of general policy. As observed by Sir Shafa'at Ahmedkhan, "the Governor-General will be inclined to back up the Federal Government in nine cases out of ten and his special responsibilites on the one hand and Paramountcy powers on the other will sometimes have to be placed at the disposal of the new federal government to assure its success. The centre will gradually absorb the powers which have been grafted on the provinces and its activities will extend to the Indian States. It is impossible to prevent the rapid growth of Federal authority and jurisdiction in those States". (*The Indian Federation*, p. 110). The same writer also says : "Within the Federal domain the Representative of the Crown will not interfere, except in discharge of his special responsibility and other obligations enjoined upon him by the Act. But in non-federal subjects his authority will remain unimpaired. In actual practice there is a possibility of the Federal ministry operating even in the sphere of Paramountcy with the consent and the support of the Viceroy, in the same way as the prerogative power of the Crown is employed by English ministers". (*The Indian Federation*, p. 39).

*Federal Executive Authority and Interests of States.*—The Government of India Act provides that in the exercise of the executive authority in any State, regard is to be had to the interests of the State concerned and the protection of such interests and rights of the State as also of the rights and dignity of the Ruler, is one of the special responsibilities of the Governor-General. In this connection, His Majesty has given the following instruction to the Governor-General. "Our Gover-

nor-General can construe his special responsibility for the protection of the rights of any Indian State as requiring him to see that no action shall be taken by his ministers, and no bill of the Federal Legislature shall become law, which would imperil the economic life of any State, or affect prejudicially any right of any State heretofore or hereafter recognised, whether derived from treaty, grant, usage, sufferance or otherwise, not being a right appertaining to a matter in respect to which, in virtue of the Ruler's Instrument of Accession, the Federal Legislature may make laws for his State and his subjects". (*Para. XV of the Instrument of Instruction to the Governor-General*). The Constitution, therefore, tries to afford the necessary protection to the States; but in practice it is difficult to say how far this protection will be effective. In the first place, the Governor-General is the sole judge of whether the interests or rights of a State are affected by any action of the Federal Government. There is no scope left to the States to approach the Federal Court for a decision on this point because the questions of rights arising out of treaties, usages etc., have been kept outside the scope of the Federation altogether. The result will be that, in cases where the Federal Ministry insists upon certain actions being taken, and in which the Governor-General may or may not concur, he will be more induced to follow the wishes of the Ministry to avert the possibility of a ministerial crisis than the strictly constitutional obligation to protect the interests of the States. Naturally he will take the line of least resistance and that is to influence the States to adopt the policy of the Federal Government even though it might be against their best interests.

*The Method of Execution of Federal Laws in the States* :— The method of enforcing Federal laws in the States or units differs in different countries. In the United States, for example, there are two distinct sets of officers in a State, State officers generally enforcing State laws and Federal officers en-

forcing the Federal laws. The division is so water tight that even if the State governments were to cease to exist, the Federal government would continue to function almost normally. On the other hand, in Switzerland or Germany, the Federal government manages directly certain important functions like the post and telegraphs, railways etc., but in other branches it depends entirely upon the co-operation of the cantonal or State authorities, working under a certain amount of Federal supervision. In India, in respect of certain matters like the military, railways, post and telegraphs etc., the Federal government acts itself with the help of its own officers. But in other matters, so far as the Provinces are concerned, the administration is entrusted to the Provincial officers working according to the instructions of the Federal government. In the Indian States, the administration of Federal laws will depend upon the arrangement arrived at between the Ruler and the Governor-General. As has been observed already, agreements will be made, according to the provisions of the Instrument of Accession, between the Governor-General and the Ruler for the exercise by the Ruler or his officers of functions in relation to the administration in his State of any law of the Federal Legislature which applies to that State. In this case, the arrangement will be the same as in the British Indian Provinces, the States working under the general supervision of the Governor-General who will satisfy himself, by inspection or otherwise, that the Federal laws are being administered in the State according to Federal policy. But in the case of States with which there is no such agreement, either in virtue of the Instrument of Accession or some subsequent arrangement with the Governor-General, the Federal government may itself administer the Federal law in such States by means of Federal officials under the Federal government's direct and exclusive control, as in the United States of America. The execution of Federal laws, whether by the State officers or by the Federal Government direct, is bound

to have considerable influence on the internal administration of the States themselves and, as such, deserves further consideration.

*What States will administer Federal Laws themselves* :— The Government of India Act empowers the Governor-General, as we have seen, to enter into agreements with the Rulers of States for the enforcement of Federal laws within the States. Such an agreement will necessarily be made only if provision has been made for it in the Ruler's Instrument of Accession. As the Instrument of Accession depends upon its acceptance by the Crown, this provision will be inserted only in the case of those States which have an efficient machinery of administration. For example, in the case of States like Hyderabad, Mysore, Baroda, Travancore, etc., which have as efficient a system of administration as prevails in British India, the Instrument of Accession will provide that the Governor-General shall entrust the administration of Federal laws within the State to the State itself. But there are a large number of States which are not so well organised either due to their poverty or to the lack of political development. In such cases, it would certainly have been unjustifiable to entrust the administration to the States. It is, therefore, in the interest of efficient and uniform administration of Federal laws that the Act leaves the discretion of admitting the right of the State to administer the laws by providing for the acceptance of the Instrument of Accession by the Crown. The Crown will normally refuse to accept an Instrument of a Ruler who insists upon the administration of Federal laws being entrusted to him but who, in the opinion of the Crown, does not possess an efficient system of administration within his State to enable him to carry out his obligations. In such cases, the Federal Government will execute the Federal laws by means of its own officers. But even though a Ruler may not succeed in getting a stipulation inserted in his Instrument for the execution of Federal laws, he is not permanently

debarred from exercising those rights and the Governor-General has been given the power to enter into agreements with such a Ruler, subsequent to the establishment of the Federation or to the Ruler's Accession to the Federation, provided he is satisfied that effective machinery for the administration of Federal laws exists within his State.

*Effects of the Execution of Federal Laws within the State.*— The general effect of the contact of the internal administration of the States with the administration of Federal laws within them will be to improve, or at least alter materially, the level of the internal administration of the States. The effect will not be seen in those states which are already efficiently equipped with the means of administration. But in those which undertake to execute the Federal laws themselves, and which have a machinery of administration which is quite suitable for their own internal needs but which may not be as efficient as in the British Indian Provinces to execute Federal laws, the effects will be more marked. The Governor-General will naturally insist upon the States maintaining a minimum number of trained and efficient officers, generally on a par with corresponding officers in British India, to ensure uniform and efficient administration of the Federal laws in the whole of the Federation. This must inevitably increase the expenditure of the State on these matters and must automatically increase the burden upon the taxpayer. If on the other hand, the State leaves the administration of Federal laws to the Federal Government itself, it exposes itself to the risk involved in admitting its inefficiency or inability to handle the Federal laws. Moreover, it creates among the citizens an idea of divided allegiance. In the United States of America, for example, the citizen of a State owes allegiance to his State in matters within the domain of the State and to the Federal Government in Federal matters. This does not make any serious difference in practice because in any case, the allegiance is ultimately to the sovereign people. But in the case of

monarchies this divided allegiance is likely to have far reaching effects upon the sense of loyalty of the subjects. It is of the essence of monarchy that the subject of the monarch should recognise no other sovereign but the monarch himself. It is on this very principle that the subjects of Indian States owe allegiance to their Rulers alone and not to the King Emperor, a fact admitted by the British Parliament in making a provision in the Government of India Act, 1935, for the representatives of the States in the Federal Legislature to swear allegiance to their own Rulers alone. In practice, a subject of a Ruler who has a grievance against the administration of a Federal law by the Federal officers will have to take recourse to the Federal Government or to the Federal Court and not to his Ruler. Secondly the existence of an independent machinery of administration within a State or what can be called an 'imperium in imperio' is bound to bring about a conflict of jurisdiction between the State and Federal authorities and thus encourage litigation.

*The Governor-General and Execution of Federal Law within the State.*—In the agreements which a State, undertaking the execution of Federal laws, will enter into with the Governor-General, there is to be a stipulation enabling the Governor-General to satisfy himself, by inspection or otherwise, that the administration of the Federal law, so far as it is applicable to the particular State, is carried out in accordance with the policy of the Federal Government and if he is not satisfied, the Governor-General in his discretion may issue such directions to the Ruler as he thinks fit. The power of inspection vested in the Governor-General is likely to have a far reaching effect upon the administration of the State. In the first place it is nowhere stated how the Governor-General is to carry on this inspection. It has presumably been left to the discretion of the Governor-General to evolve means for efficient inspection of the execution of Federal laws by the State. Moreover, apart from inspection, what do the words 'or otherwise' mean? How

is the Governor-General to supervise the execution of Federal laws in a State otherwise than by inspection? Questions were put to Sir Samuel Hoare, Secretary of State for India, during the course of his evidence before the Joint Parliamentary Committee but he evaded any definite reply and contented himself by saying that every means must be given to the Governor-General to see that the Federal laws are properly executed. But taking it as it is, one does not understand exactly what it indicates. Does it mean that the Governor-General can employ secret service to ascertain the position of Federal administration within the State or in the alternative, will the Governor-General rely upon the confidential reports of persons entrusted with this work? Is it likely that he may entrust his powers of 'inspection or otherwise' to the Resident or the Political Agent and act upon the reports of such officers as he does in matters under the purview of Paramountcy? This second possibility, which is more probable, is frought with serious dangers to the internal autonomy of the States. At present the Resi dent generally keeps himself aloof from purely internal affairs of the State, although sometimes he insists upon getting reports of certain activities within the State. He is concerned mainly with the relations between the State and the Paramount Power. Already a powerful force within the State by virtue of rights and privileges assumed against the treaty-rights of the State, in most cases, the extension of the Resident's powers by investing him with the duties of ascertaining the position of federal execution within the State, by inspection or otherwise, will enhance his power and influence and is quite likely to give a tool in the hands of a meddlesome Resident to interfere in the day to day administration of the State.

*The States and Enforcement of Federal Obligations* :—The Government of India Act lays down that the executive authority of the State shall be so exercised as not to impede or prejudice the exercise of Federal authority under any law. Whether the

authority claimed by the Federal Government exists or not is a question to be decided by the Federal Court on the initiative either of the Federal Government itself or the State concerned. But if the Governor-General is not satisfied with the executive action of the State, he may in his discretion, after considering the representations which the Ruler may make on the subject, issue necessary directions to him. A question, which is more or less of theoretical rather than of practical politics, arises in the contingency of a State refusing to carry out the obligations imposed upon it by the Federal Government. The Act merely says that the Governor-General can issue directions to the Ruler. In the first place as the directions are to be given in his discretion, he is not bound to give the same directions to the Ruler as the Federal Ministry may wish him to do nor can the directions given by him be challenged in the Federal Court. The question arises, supposing the Ruler refuses to follow the directions of the Governor-General, what remedy does the Act provide for the Governor-General to enforce his directions? The Act is silent on this point and the silence is deliberate as the very existence of the power of Paramountcy in the second personality of the Governor-General as the Representative of the Crown, is enough guarantee against any possible disobedience by the Ruler of a State. Sir Samuel Hoare explicitly told the Joint Parliamentary Committee that a statutory provision for enforcement of Federal obligations was not thought of as essential in view of the existence of the powers of Paramountcy. How far this exercise of Paramountcy Powers within the sphere of Federal subjects is legal is more or less an academic question and not one of practical politics since no State can dare to oppose the dictates of Paramountcy.

*General Observations* :—Speaking generally, one wonders what advantage the States are going to derive by joining the Federation. As has already been observed, the chances of the States representatives forming the Federal ministry are almost

non-existent and even when States representatives are included in a ministry formed by some other party their proportion will be so insignificant as to produce practically no effect upon the policy of the Federal Government. It must be the natural tendency of the party forming the Ministry to include in it such representatives of the States who can bring with them a substantial following to the aid of the ministry in the Federal Legislature. Considering from this point of view the representatives of the States who may find some places in the ministry will be usually from the bigger States like Hyderabad which has twenty-one representatives, or Mysore which has ten, in the Federal Legislature. States having smaller number of representatives will rarely have the fortune of finding their spokesmen in the Federal Ministry and hence it is no exaggeration to say that the influence of 99 per cent of the States on the policy of Federal administration will be negligible. But in spite of their evident inability to influence the policy of the Federal Government, the States will have to face the repercussions of this policy on their internal administration. We have seen that in the case of most of the States which undertake the execution of Federal laws themselves, the cost of administration will increase and consequently it will enhance the burden upon the tax-payer, creating discontent among the subjects. Even with all this additional burden, they cannot escape interference from outside because the Governor-General has the power to satisfy himself by inspection or otherwise that federal laws are executed in the spirit of the policy of the Federal Government. There will inevitably be innumerable instances wherein State administration may not rise to the level which the authorities entrusted with the duty of inspection may expect and so give rise to occasions for the Governor-General to issue such directions to the Ruler as he may think fit. It is not improbable that in such circumstances the Rulers will be 'advised' to employ British officers for carrying out the policy of the Federal

Government and so increase the influence of the British Government in the internal administration of the State. Any observer of the situation in the States will agree that this tendency of 'lending' British officers to the States has already made itself visible in many States. On the other hand, if Federal administration within the State is left to the Federal Government, it will not only create occasions of conflict with the jurisdiction of the State but, as has been previously observed, create divided allegiance among the subjects and by trying to present an invidious contrast, create in the subjects a disrespect for their own system of administration. This state of affairs is bound to impair the sense of devotion and loyalty which the subjects of the States possess for their Rulers. Briefly stated, from the point of view of the Ruler of a State, the position is that while the State gets practically no voice in the shaping of the policy of the Federal Government, it has to face the inevitable rise in expenditure and the equally inevitable growth of influence of the British Government within it and, if it is not in a position to afford the execution of Federal laws itself, it has to undergo the risk involved in having a parallel government within the State, the existence of which must create feelings of disrespect for the State administration among the subjects.

# CHAPTER VI.

## THE INDIAN STATES AND THE FEDERAL JUDICIARY

*The Importance of the Federal Judiciary* :—The distinguishing characteristic of a federal union is the division of competence between the union and the several States which compose it. This division is made by the Federal constitution or organic act of union which marks out a sphere of action and authority for each upon which the other is forbidden to encroach. To maintain this equilibrium and to ensure the supremacy of each in the sphere allotted to it some supreme umpire, arbiter or judge is desirable to enforce respect for the constitutional division of competence and to decide issues arising out of conflicts of authority. In the absence of any such institution, there will be perpetual encroachments and controversies which may endanger the very existence of the Federal government. In all existing federal systems the judiciary generally plays this important role of the umpire and there is a general agreement that there is no other organ of government so well-adapted to play this delicate, impartial and indispensable part.

*Constitutional Provisions.*—(a) The Government of India Act, 1935, establishes in India a Federal Court which, according to the Joint Parliamentary Committee, is to be 'at once the interpreter and guardian of the Constitution and a tribunal

for the determination of disputes between the constituent units. This court consists of a Chief Justice of India and such number of other judges, not exceeding six, as His Majesty may deem necessary. A person is not qualified for appointment as a judge of the Federal Court unless he (1) has been for at least five years a judge of a High Court in British India or in a Federated State or (2) is a barrister or an advocate of ten years' standing, or (3) has been for at least ten years a pleader before a High Court in British India or in a Federated State.

(b) Jurisdiction of the Federal Court: The Federal Court has, with respect to the Federated States, (1) original jurisdiction and (2) appellate jurisdiction in appeals from High Courts in such Federated States. The original jurisdiction of the Federal Court is thus defined in the Act: "Section 204—(i) Subject to the provisions of the Act, the Federal Court shall, to the exclusion of any other court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question whether of law or of fact, on which the existence of a legal right depends; provided that the said jurisdiction shall not extend to:

(*a*) a dispute to which a State is a party unless the dispute (i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State; or

(ii) arises under an agreement made under part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's

Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute ;

(*b*) A dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

In the exercise of its original jurisdiction the Federal Court shall not pronounce any judgment other than a declaratory judgment.

(*c*) Appeals to the Federal Court : Section 207 of the Act provides that an appeal will lie to the Federal Court from a High Court in a Federated State by way of a special case to be stated on the ground that a question of law has been wrongly decided. Such question must be one which :

i. concerns the interpretation of the Act or of an Order in Council made thereunder : or

ii. concerns the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State ; or

iii. arises under an agreement made under part VI of the Act (which deals with the administrative relations between Federation, Provinces and States) in relation to the administration in that State of a law of the Federal Legislature.

(*d*) Appeals to the Privy Council : An appeal may be brought before the Judicial Committee of the Privy Council in England from a decision of the Federal Court in a certain prescribed manner. It can be brought without the leave of the Federal court in case of any judgment of that Court given in the exercise of its original jurisdiction in any dispute which concerns the interpretation of the Act or of an Order in Council made thereunder, or the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument

of Accession of any State, or arises under an agreement made under Part VI of the Act in relation to the administration in any State of a law of the Federal Legislature. The leave of the Federal Court or of His Majesty in Council is essential in all other cases.

(*e*) The decisions of the Federal Court : Where the Federal Court allows an appeal it will remit the case to the Court from which the appeal was brought with a declaration as to the judgment, decree or order appealed against. The Court from which the appeal was brought will give effect to the decisions of the Federal Court. It has been laid down in section 210 that all authorities, civil and judicial, throughout the Federation are to act in aid of the Federal Court while section 212 stipulates that the law declared by the Federal Court and by any judgment of the Privy Council shall, as far as applicable, be recognised as binding on all Courts in British India. It shall also be binding in any Federated State so far as respects the application and interpretation of this Act or any Order in Council thereunder or any other matter with respect to which the Federal Legislature has power to make laws in relation to the State.

(*f*) Procedure in appeals from State Courts : An appeal from a High Court in a Federated State to the Federal Court will be by way of a special case to be stated by the High Court for obtaining the opinion of the Federal Court. The Federal Court may, on the other hand if it thinks fit, cause letters of request to be sent to the Ruler of the State, calling upon the State High Court to state a case, that is to set out the facts of the dispute and the law which it applied to those facts. The Ruler will pass on these letters of request to the State High Court. The Federal Court may, if necessary, return the case so stated and require the State High Court to set forth further facts. But in all such matters or in other matters relating to

the States the Federal Court shall act through letters of request to the Ruler who shall secure their execution.

(*g*) Declaration of State Courts as High Courts : Section 217 of the Act povides that reference in any provision of the Act to a High Court in a Federated State shall be construed as reference to any Court which His Majesty may, after communication with the Ruler of the State declare to be a High Court for the purposes of that provision.

*States and the Jurisdiction of the Federal Court* :—As in all federal constitutions, the Federal Court in India has been established to act as an interpreter and guardian of the Constitution. The extent of its jurisdiction is, however, a little different in the case of the States from that of the British Indian Provinces. Although it can adjudicate upon all matters in dispute betwen the Federation and the Provinces, or the Provinces *inter se*, its competence with regard to the Federated States is restricted chiefly to the interpretation of the Act or an Order in Council made under the Act. The Instrument of Accession of every State will also be interpreted by the Federal Court and its jurisdiction will extend only to such matters as the Ruler has agreed by his Instrument to leave within the scope of the Federal Legislature. Thus the Instrument of Accession of every State will determine the question of the application of the provisions of the Constitution to such State and the Federal Court, before it exercises its jurisdiction in such matters, will have to decide whether the subject in dispute is covered by the Instrument of Accession. If it is not, the Federal Court obviously does not get any jurisdiction. Thus by restricting the competence of the Federal Court to the terms of the Instrument of Accession, the powers of the Federal Court have been limited and it cannot possibly extend the jurisdiction of the Federal Government by a doctrine of implied powers as in the United States of America.

*Jurisdiction in disputes arising out of Administration of Federal Laws* :—We have noticed in the last chapter that the Act provides that the Governor-General may, and if provision has been made in the Instrument of Accession shall, enter into an agreement with a State for the administration of the laws of the Federation so far as they may be applicable to the State. If any such agreement is made, the interpretation of this agreement will be made by the Federal Court at the instance of either party. But this obviously applies to questions whether a particular action or procedure comes under the arrangement or not. As we have seen, in cases where the administration has been handed over to the State by the agreement above mentioned, the Governor-General has the right to satisfy himself that the administration is carried out according to the Federal polity and to this end he can issue directions to the Ruler in his discretion. The point to be noticed is that since these directions are issued by the Governor-General acting in his discretion, the Ruler cannot challenge these directions in the Federal Court. He must follow whatever directions the Governor-General is pleased to issue in these matters.

*Jurisdiction by special Arrangement between the States and the Federation or Provinces* :—The Act provides that the jurisdiction of the Federal Court shall extend also to disputes arising under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative, for the exercise of the functions of the Crown in its relations with Indian States, between a State and the Federation or a Province, the agreement expressly providing for this exercise of jurisdiction by the Federal Court. This provision has kept the door open for extending the jurisdiction of the Federal Court to several cases not covered by the Instrument of Accession but which may afterwards be considered by the parties concerned to be worth being adjudicated upon by the Court. It is, how-

ever, difficult to understand why the approval of the Representative of the crown has been laid down as the condition precedent for such an agreement. This condition seriously handicaps the exercise of free will by the States to delegate disputed points for judicial rather than the administrative decisions of the Paramount Power. The restriction could be defended on the ground that it would put a check upon the tendency to take unimportant disputes to the Federal Court. But in effect, this restriction is more likely to hamper the States in having their legitimate grievances redressed by a judicial tribunal and no justification appears to exist for retention of such a condition as it has been already provided that such disputes can go only by mutual agreement of the parties.

*Appeals to the Federal Court* :—In respect of the States, the Federal Court has original jurisdiction only when the parties to the dispute are the Federation, the Provinces and the States. No case in which one of the parties is a private citizen can be entertained by the Federal Court in its original jurisdiction. Such a dispute must first be taken to the competent court in the State concerned. But an appeal has been provided when the decision of the State High Court concerns the interpretation of the Act, or an Order in Council or matters arising out of the Instrument of Accession or agreements made in virtue of the Instrument. But there is a special procedure prescribed in the case of such an appeal. In all matters relating to the States the Federal Court must act through letters of request to the Ruler who must secure their execution. This principle does not, of course, make any distinction between the jurisdiction of the Federal Court, in such cases, over the Provinces and the States. The procedure has no parallel in any Federal constitution but has been specially adopted in order to recognise the solemn position of the Ruler, a provision in keeping with the general policy of the British Government of recognising the dignity and honour of the Indian Princes in

non-essential matters or matters which do not concern the interests of the Paramount Power.

*Execution of Decrees of the Federal Court* :—Although it is laid down in section 210 of the Act that all authorities, civil and judicial, throughout the Federation will act in aid of the Federal Court, some doubts may be expressed concerning the effective execution of the decrees of the Federal Court in the States, since the execution of such decrees has been left to the States themselves. This is especially the case when the decree of the Federal Court is against the State which has to execute it. In all federal countries it is the duty of the Federal Government to see that the decrees of the Federal Court are duly executed by the authorities concerned with such execution, and to use coercion if necessary. In India no such power exists in the hands of the Federal Government. Neither the Federal Court nor the Federal Executive can enforce the Federal decisions within the States. As in the other matters, the Federal Court will have to look to the Representative of the Crown to exercise his powers of Paramountcy for the protection of the prestige and dignity of the highest tribunal of the Federation. Paramountcy, which is supposed to function only outside the ambit of the Federation, will be invoked as an effective weapon as no State can dare oppose the dictates of Paramountcy. Thus even in the execution of the decrees of the highest legal tribunal, Paramountcy will assert itself where it has legally no right to interfere.

*Recognition of State High Courts* :—Section 217 of the Act says that for the purposes of the Act, only those courts which are declared by His Majesty as High Courts after consultation with the Ruler concerned shall be considered as High Courts in the States. The provision has obviously been designed to preserve the standard of justice and efficiency in the High Court of a Federated State which has to be a court of first instance in Federal matters. There is no question with regard to the

High Courts in States like Hyderabad, Mysore or Baroda which have an efficient judiciary with a bench of competent judges. But there are a number of States which cannot afford to have judges who would be considered as efficient to act as judges in Federal matters. Such States will have to improve their judicial machinery which inevitably means increase in expenditure. The Act does not mention what the situation will be if certain State Courts are not recognised as High Courts for the purposes of the Act. The chances appear to be that an efficient High Court embracing jurisdiction over several States may be established under the influence of the Paramount Power.

*The Executive Decisions of the Paramount Power* :—There is not much to be criticised so far as the duties of the Federal Court under the Government of India Act are concerned. The real criticism lies not in what it has been empowered to do but in what it has not been empowered to do. The operation of the Act narrows down the jurisdiction of the Federal Court to very few matters concerning the States. An extensive field is still left to the executive decisions of the Paramount Power, without any right of redress from the Federal Court. The defects of the decisions of the executive have been described by Lord Hewart, Lord Chief Justice of England, thus : "It may well be that in a particular case, a perfectly correct opinion may be obtained from some anonymous person, incapable of identification, who heard none of the parties to a controversy but brought his individual reason to bear in private upon a miscellaneous bundle of correspondence. It is even possible that, in a particular case, a mysterious individual of that kind might not be in the smallest degree tempted or diverted from a sound opinion by the fact, if it happened to be the fact, that he was closely associated with one of the parties to the controversy. But it is manifest that an opinion so arrived at differs by the whole width of the heavens from the decision of a Court". (*New Despotism*, P. 35-36). In all cases between the States

and the Paramount Power, the latter acts both as the party and the judge and the States have to follow their verdicts, which are by no means judicial, merely because they cannot do otherwise !

*Paramountcy and the Federal Court* :—The greatest criticism against the competence of the Federal Court lies in the exclusion of the domain of Paramountcy from the province of Federal justice. Paramountcy still continues to be paramount and can be altered to suit changing circumstances. It is this uncertain or indefinite scope of Paramountcy that causes a sense of unrest and insecurity in the minds of the Princes and it was to bring this indefinite Paramountcy under the control of the Federal judiciary that the States agreed to join the Federation. For example H. H. the Maharaja of Nawanagar said, at the First Round Table Conference : " While asking for Federation, we also ask for the ' judicial ' ascertainment of the rights of the States. The present position that the Paramount power can at will override the treaties is extremely unsatisfactory. It is so utterly inconsistent with the Royal Proclamation, in which the world was told that the treaties with the States are inviolate and inviolable, after they had been similarly pronounced to be sacred and sacrosanct". (*Proceedings of the First Round Table Conference,* P. 127). The point was more specifically put by H. H. the Maharaja of Bikaner, who said, " We, therefore, attach the utmost importance to the establishment of a supreme court with full powers to entertain and adjudicate upon all disputes of a justiciable nature as to our rights and obligations guaranteed under our treaties". (*Proceedings of the First Round Table Conference,* P. 38). These quotations are clear enough to indicate that the aim of the Princes in agreeing to the Federal idea was the definition of their rights and establishment of a Court that would interpret the treaties legally and not ' politically ' as it is being done at present. This condition has been completely ignored and the Federation is being

thrust upon them with the Federal judiciary impotent to protect them against the chief danger which they have to face. It is no exaggeration to say that most of the Princes supported the Federal idea under the impression that it would 'constitutionalise' the Political Department of the Government of India. They waited and waited until the picture was complete. The completed picture brought disillusionment and disappointment.

# CHAPTER VII

## THE INDIAN STATES AND AMENDMENT OF THE FEDERAL CONSTITUTION :

*Introduction.*—A study of the position of the Indian States under the Federal scheme in its legislative, executive and judicial aspects leads naturally to the discussion of the question of the amendment of the Constitution. We have seen that every federal union has a written constitution but a written constitution, in itself, even if it presently defines the authority of each organ of the Federal Government, is not a guarantee against alterations which may affect these fundamental rights defined by the constitution. Every constitution, therefore, provides a special procedure by which it can be amended. In some countries, like England, constitutional amendments can be made in the same manner as ordinary legislation. But a federal union being a compact between different parties cannot afford to have its constitution amended without at least a substantial agreement between the component members of the union.

*States and Constitutional Amendment.*—The case of such an amendment in the Federal constitution in India is peculiar due to the peculiarity in composition of the Federation and diversity of its units. So far as the British Provinces are concerned, they are completely subservient to the British Parliament and any law can be passed or amended by

Parliament which may affect these Provinces. But the case of the States is altogether different. The States are sovereign and Parliament has no right to legislate for them. The Government of India Act itself does not apply to the States *ab initio* and even when States agree to join the Federation, it applies to them so far and in such matters as are expressly agreed to by the Rulers in their Instruments of Accession. It, therefore, follows that the basis of agreement is the Ruler's Instrument of Accession and not the Government of India Act. Hence any amendment of the Government of India Act cannot be binding upon the States unless they agree to amend or supplement their Instruments of Accession accordingly. The Instruments of Accession are bilateral treaties between the Crown and the Rulers of the States who join the Federation and the terms of the treaty can be altered only by mutual consent.

*The Government of India Act, 1935 and its Amendment.*— The Government of India Act, 1935, contains no provision for its amendment. Like all acts of Parliament, it can be amended by Parliament alone. It is, of course, a fact that there are no provisions in the Canadian constitution for its amendment but this omission is merely formal since any amendment which the Dominion Parliament proposes to the Imperial Parliament is almost invariably approved by the latter. This is not the case in India. The right of amending the Constitution has been reserved by Parliament to itself. The preamble to the Government of India Act, 1919, says : "and whereas the time and manner of each advance can only be determined by Parliament upon whom responsibility lies for the welfare and advancement of the Indian peoples", and although the Act of 1919 is now repealed, the preamble has been continued to indicate that the same policy still continues. There are, however, certain minor points in which the Federal Legislature can propose, not make, amendments ; for example, with regard to the

size and composition of the Federal Legislature. But no amendment which seeks to vary the proportion between the memberships of the two houses of Legislature or the proportion between the number of seats allotted to British India and those allotted to the States in either chamber can even be proposed. Besides these minor points, amendments can be made by Parliament regarding certain items mentioned in the Second Schedule of the Act without affecting the accession of the States and such amendments can apply to the States only after their acceptance by supplementary Instruments. This question attracted considerable interest during the debates in the House of Commons on the Government of India Bill. The Attorney General said : "Any amendment of a provision (not comprised in Schedule 2) will give a State the right to reconsider its position because the Instrument of Accession was made upon a certain basis and the amendment.....has changed that basis.". (*Debate*, May 26, 1935). A similar view was also expressed by the Solicitor-General. He said : "This amendment (new sub-section to Clause 45) would safeguard the rights of the States in exactly the same way as they are safeguarded in Schedule 2, namely, if in the amendment which Parliament makes it alters the protective clauses which affect the States, then their instruments of Accession are voided." They need not go out automatically, but they have a right to say, 'this is a different Federation'. Negotiations will take place, but in the last resort, they have the right to say : 'In spite of your negotiations this is not the Federation which we joined and therefore our Accession is no longer a valid instrument'. (*Debates*, May 27, 1935). This question was more clearly explained by the Secretary of State for India. "Since Princes enter the Federation, as set out in the Act, of their own volition and according to their Instruments of Accession, it would, of course, have been quite unfair to them, and indeed their adherence could never be obtained, if there was an unlimited

power for subsequent Parliamentary legislation to alter the Federal Constitution, leaving the States completely bound to a totally different type to that which the Princes had agreed to accede to....if the 'protected' provisions are amended by Parliament, the State has the right to reconsider its position, or in more technical language it may be said that if 'protected' provisions are amended, the State's Instrument of Accession is voidable, though not void". (*Parliamentary Reports*). This peculiar position of the States in the Federation has led to the criticism against the States because it is said that the possibility of introducing responsible government at the Centre for British India is entirely dependent upon the willing consent of the States. The critics ask : "Is all future amendment or, in fact, all political progress of British India to depend upon the sweet will of an insignificant or petty Prince? Constitutionally the position is exactly that. Any amendment which affects the basis of the Instrument of Accession of any Prince can be disclaimed by that Prince. The Constitution is cast-iron and has no seed for automatic growth in it.

*The States and Secession from the Federation.*—A natural question which arises from the preceding discussion is, since Parliament is omnipotent, what will be the result if it amends the Government of India Act without the consent of all the Princes? The action of Parliament will be legal and binding upon the British Indian Provinces. But, as has been already observed, even the Government of India Act itself does not apply to the States except in so far as it has been expressly accepted by their Instruments of Accession. Any amendment of the Act, therefore, cannot be applicable to the States till it is accepted by them. If the amendment is put into effect even against the wishes of any of the States, the obvious legal remedy is to go out of the Federation. A Federation is usually considered as an indissoluble union although there is no reason why it should logically be so. But the circumstances in

India are quite different and there is every justification for a State to secede from the Federation if attempts are made to alter the constitution against its wish. The States in other Federal unions combined together by compacts which enjoined on them to take the consequences of their action according to the terms of the compact. The states in India are joining the Federation on specific terms laid down in their Instrument and cannot be justifiably asked to accept any amendments alien to the original terms. In this case, the contract becomes voidable and the States can resume their former position as if the Federation had never been formed. This is the strictly legal position.

*Breakdown of the Constitution* :—There is another contingency which is contemplated by the Act and which may give the States an occasion to secede from the Federation. The Act stipulates that if at any time the Governor-General is satisfied that the Government of the Federation cannot be carried on, he may issue a proclamation declaring that his functions to such extent as is specified in the proclamation shall be exercised by him in his discretion, and assume to himself all or any of the powers vested in or exercisable by any Federal body or authority other than the Federal Court. He may by the same proclamation modify the provisions of this Act or suspend them in whole or in part excepting those relating to the Federal Court. The proclamation ceases to operate after six months but can be continued by issuing fresh proclamations with the approval of Parliament for a maximum period of three years. After the expiry of this period government will be again carried on according to the Act, if possible, or under such amendments as Parliament may think necessary. The condition of the Indian States under this contingency becomes precarious. If this state of affairs is allowed to continue it means, in effect, an annexation of the States. While recognising the necessity of such emergency powers in the hands of the Governor-General, the States made it clear that they cannot be ruled by the Governor-General

himself for an indefinite period or be forced to accept amendments which Parliament may like to impose to meet the changed circumstances. Subsection 4 of Section 45 of the Act dealing with this possibility of the breakdown of the constitution, safeguards the rights of the States precisely in the same way as they are safeguarded in regard to schedule 2 of the Act. Hence if Parliament passes an amending Act which alters those sections of the Act of 1935 which safeguard the rights of the States, their Instruments of Accession become voidable and they will be entitled to reconsider their attitude towards the Federation. If the basis of the Federation is shattered, the Princes will be free to leave the Federation. This point of the Princes was eminently reasonable and has been accepted by the Act.

*The Possibilities of Future Constitutional Amendments* :— Although legally there is obviously no scope for any substantial amendment in the Constitution, one cannot believe that no amendments will ever be made without the unanimous consent of all the Princes. Looking to this question from a practical point of view, one must deny that constitutional barriers can obstruct the growth of political institutions permanently, if the popular will is sufficiently strong. No authority, be it that of a monarch or Parliament, is ever willing to part with its power unless forced by the logic of circumstances and no one can deny that political progress in India is due to the growth of political consciousness and solidarity and not to the willing gift of Parliament. Although the present Constitution has a look of finality about it, the growing strength of the people in British India will in course of time force the British Parliament to concede further reforms and legal difficulties cannot for ever obstruct the path of political development. Further reforms will have to be introduced whether the Princes want them or not and any opposition that they can offer to future amendments may at the most postpone the growth of political deve-

lopment but cannot permanently obstruct such growth. Legally, in such a case, they will be entitled to leave the Federation and go their own way; but what is legally possible is not always politically feasible. It is evident that the Princes have been brought into the Federation to serve as a stabilizing influence in Indian politics and consequently are expected to shield the interests of the British Government. Their secession from the scheme of Indian Federation, even if welcomed by the British Indian public, would be strongly opposed by the British Government. The inevitable result will be that while the British Government concedes further reforms in India, it must seek to secure the 'willing co-operation' of the Princes with the help of the powers of Paramountcy which is capable, as described by the Butler Committee, of defining or adapting itself according to the shifting necessities of the time.

# CHAPTER VIII

## THE INDIAN STATES AND MISCELLANEOUS FEDERAL QUESTIONS

*Introduction* :—We have in the preceding chapters discussed the relations of the Indian States with the main organs of the Federal Governments, namely, the Legislature, the Executive and the Judiciary. We also discussed the question of the amendment of the constitution of the Federation. But a study of the relationship of the States with the Federal Government would not be complete without a brief survey of certain miscellaneous questions, regarding the Federation in which the States are interested. We now proceed to study briefly some such questions.

*Broadcasting* :—Broadcasting plays a very important part to-day in creating, influencing and guiding public opinion. Broadcasting has been left to the Federation subject to certain conditions. It is provided that the Federal Government shall not unreasonably refuse to allow the Ruler of a State to construct or use transmitters in his State and to regulate and impose fees for their use or the use of receiving apparatus. But this does not empower the State to regulate the use of transmitters constructed or maintained or authorised by the Federal Government. The functions entrusted to the State are to be exercised subject to certain conditions, including those relating

to finance, made by the Federal Government. But broadcasting itself shall not be subject to any conditions, except in so far as it appears to be necessary to enable the Governor-General to discharge his functions in his discretion or in respect of the peace and tranquillity of India. Every Act of the Federal legislature shall see that effect is given to these provisions. The Governor-General is the final authority to decide whether conditions imposed or refusal to entrust functions to a State are reasonable or not.

*Interference with Water Supplies* :—There are many rivers or water courses in India which run through two or more Provinces or States and disputes among the Provinces and States through which they pass are not unlikely. The Act provides that if a Province or State complains to the Governor-General that it is affected prejudicially by any executive action or the legislation of another unit with respect to the use, distribution or control from any national source of supply, the Governor-General may, if he regards the issue as serious, appoint a commission of experts in irrigation, engineering, administration, finance or law, to investigate the matter and to report on it with its recommendations. The Governor-General shall then decide and make any order he thinks proper, unless before his decision is given, the Province or the Ruler asks for decision of the King in Council. The order passed by the Governor-General or the King in Council shall override any Federal or Provincial or State Act to the extent of its repugnancy to the order. The order shall also deal with the question of the burden of costs of the inquiry. A Ruler of a State, however, may exclude the application of the provisions as to water supplies to his State by his Instrument of Accession.

*The States and Federal Railway Authority* :—The railways in India have so far been managed by the Railway Board working under the direction of the member of the Governor-

General's executive council in charge of the Department of Commerce and Industry. To secure the working of the railways on business principles and to free their administration from political and governmental influence, their administration under the Government of India Act, 1935, is vested in a separate corporate statutory body called the Federal Railway Authority. So far as the States are concerned this does not make any change; instead of the Railway Board there will now be the Federal Railway Authority. As before this Act, the States who managed their own railways will continue to manage them subject to the general instructions of the Railway Authority. The Authority and the Federated States are bound to afford reasonable facilities for through traffic on the railways for which they are responsible, and there is to be no unfair discrimination between one railway system and another by the granting of undue preferences or otherwise, and no unfair or uneconomic competition. Complaints by the Authority or by a Federated State are to be examined and passed upon by the Railway Tribunal. Any complaint by a State against a direction by the Authority as to interchange of traffic or maximum or minimum rates and fares, or station or service terminal charges, which involves discrimination or imposes an obligation on the State to construct a new railway, where it is alleged that unfair or uneconomic competition would result is to be referred to the Railway Tribunal. The provision requiring a reference to the Tribunal does not apply in any case where the Governor-General in his discretion certifies that, for reasons connected with defence, effect should be or should not be given to a proposal for the construction or reconstruction of a railway. The Railway Tribunal will consist of a judge of the Federal Court as President and two more members appointed by the Governor-General. This Tribunal alone has the jurisdiction in such cases and has all the powers of a court for conducting the proceedings. An appeal can be

made to the Federal Court on questions of law only and the decision of the Federal Court is to be final.

*The States and Federal Finance* :—In any federation, the problem of the allocation of resources is necessarily one of difficulty since two different authorities—the federation and the units—each with independent powers raise money from the same body of tax-payers. The problem becomes more difficult when the units of the Federation are not uniform. In India, for example, the presence of the States has created complications in the Federal financial arrangements. The States insisted that no direct tax should be levied by the Federation within a State. The ultimate arrangements arrived at with regard to the contribution of the States to the Federal fisc may be briefly stated thus : the States will contribute in the nature of indirect taxation through customs, salt duty, profits of currency, profits of trading companies earned in the States and brought to account in British India, etc. The States will not contribute anything by way of direct taxation except in special circumstances. If the Federation is required to levy a surcharge on incomes in addition to the income tax to meet its financial obligations, the States will have to agree to the same surcharge being levied in their States but the Ruler can demand that instead of the tax being levied in the State, a contribution shall be payable equivalent to the net proceeds which the tax would yield in the State. Similarly the Federation will have power to impose a corporation tax, that is a super tax on the income of trading companies, which will be applicable to the companies within the Federated States. But in this case also, the Ruler can demand that instead of the direct levy of the tax, a contribution equivalent to the net proceeds which the tax would yield shall be paid to the Federation. But the Act provides also that such a corporation tax shall not be levied before the expiry of ten years from the establishment of the Federation. The Act further provides that when a Ruler elects to contribute a fixed sum, he shall cause

to be supplied to the Auditor-General of India such information as the Auditor-General may reasonably require in order to fix the contribution. If the Ruler is dissatisfied with the amount fixed, he may appeal to the Federal Court which, if satisfied that the amount is excessive, can reduce it. The decision of the Federal Court in this matter is final.

*Tributes from the Indian States.*—One of the Principles of a federal union is that there should be no invidious distinction between the units of the federation. At present many States in India pay cash contributions and tributes to the Government of India in lieu of military and other obligations. With the entry of the States into the Federation, these payments become anomalous and some provision has to be made for their adjustment. There are in addition special immunities which some of the States enjoy in virtue of their treaties in matters of postal arrangements, currency, etc. The basic principle of the financial arrangements between the Federation and the States under the Government of India Act, 1935, is the gradual abolition over a period of twenty years of such contributions paid by the States to the Crown as are in excess of the immunities which they enjoy. This arrangement is often criticised as being unusual and is being interpreted as an inducement to the States to join the Federation. Whatever the motive might be, there is no doubt that the payment of tributes, which indicates the inferiority of the party paying them, is anomalous in a Federation which aims at securing the equality of status of the units.

*Compensation for Ceded Territories.*—A question similar to that of tributes arises in the case of certain States which ceded a portion of their territory to the British Government in consideration of military service or other obligations. On the question of the ceded territories the Davidson Committee states : "Our inquiries establish beyond all doubt that tributes and cessions of territory have, for the most part, a common origin,

and that as often as not, it was entirely a matter of chance whether a State paid tribute or ceded territory instead. Although the circumstances in no one State illustrate the entire process of development, the course of events in most cases was very similar". (*Indian States Committee—Financial Report* p. 34). It was, therefore, argued by such States who had ceded territories in the past that they were entitled to compensation for those territories on the same grounds as remissions of tributes were demanded. The argument was accepted and the Act provides that the Crown may direct such sums as it thinks fit to be paid to any State which has in the past voluntarily ceded territory to the Crown in return for specific military guarantees, or in return for the discharge of the State from obligations to provide military assistance, on the condition that the State waives such guarantees. In fixing the amount of compensation, consideration will be made of the value of any privilege or immunity enjoyed by the State. As in the case of tributes, this remission in the case of ceded territories will end before the expiry of twenty years from the establishment of the Federation.

*General observations* :—The financial arrangements so far as the States are concerned have been severely criticised by British Indian leaders. They contend that the entry of the States into the Federation has brought no financial gain to the Federal revenues. On the contrary, the Federal Fisc has to pay them a substantial amount. The effect is that the Federal financial arrangements are more beneficial to the States than to the Federation. In the first place we must note that the arrangements regarding remission of tributes and compensation for ceded territories are only meant to rectify an anomalous and unjustifiable position. Secondly, some such difference is inevitable owing to the fact that the system both of political organisation and financial arrangement in the States differs materially from that prevailing in British India. All these

questions have been very carefully considered by the Davidson Committee and the points to be remembered in the adjustments of the financial relationship between the States and British India have been clearly explained by them. The concluding paragraph of the Davidson committee's report explains how these adjustments should be looked at. "But if, after every adjustment has been made and every consideration which we have mentioned has been taken into account, there is still a substantial balance against British India, even this is not the last word. By the very fact of their entry into the Federation, the States make a contribution which is not to be weighed in golden scales. We are far from saying that the financial aspect of Federation is not of very great importance, especially in these difficult times; but it is necessary also to preserve a sense of proportion, and to view all the elements of the problem in due relation to one another". (*Indian States Enquiry Committee—Financial Report*, Para. 449).

# CHAPTER IX

## FROM THE PRESENT TO THE FUTURE

*Recapitulation* :—A study of the important part which the Indian States are expected to play in the working of an All-India Federation leads inevitably to a discussion of the future of the States externally and internally. Looking back into the historical past, we saw that most of the States emerged as independent entities on the disruption of the mighty Mogul empire. They came into contact with the British power first as patrons of British traders and later on as equals on an international basis. This basis was gradually changed to one of subsidiary alliances in the days of Wellesley and, still further, of subordinate isolation in those of Lord Hastings. In the days of the successors of Lord Hastings, the States had to face an intensely aggressive policy, the greatest protagonist of that policy being Lord Dalhousie whose indiscriminate annexations were notoriously dangerous to the existence of the States. As observed by Prof. Westlake, "The constitutional relations between the Indian States and the Government of India have been gradually changed. Their relations have been imperceptibly shifted from an international to an imperial basis. The process has been veiled by the prudence of statesmen, the conservatism of lawyers and the prevalence of certain theories of sovereignty—veiled but neither prevented nor retarded."

(*Principles of International Law*, P. 227). The transfer of the Government of India to the Crown as a consequence of the Mutiny of 1857 and the memorable proclamation of 1858 of Queen Victoria, which has been considered by many as the Magna Charta of India, raised the hopes of the States for a peaceful and undisturbed enjoyment of whatever sovereign rights they then possessed under the benign protection of the British Government. But unfortunately words and deeds are often poles asunder! Although the direct extension of British dominion has ceased, the policy of interference which was the logical outcome of the subsidiary alliances of Wellesley still continued more cautiously, more guardedly and under the cloak of legality. Words like treaties, usages, customs, decisions, etc., have acquired a strange and extra-legal meaning in the dictionary of the political practice of the British Government in their relations with the States. The breach of the treaty of neutrality of Belgium by Germany, who treated it as a 'scrap of paper', shocked the political and moral consciousness of the world. In India, hundreds of solemn treaties with the States have been treated no better than 'scraps of paper' by the same mighty power which rose in arms against Germany in defence of the treaty-rights of Belgium. An appeal to arms which is recognised as the last means of combating a flagrant breach of an international treaty or an agreement between two independent nations is obviously out of the question between the British Government and the Indian States. Representations and protests are the only 'weapons' in the hands of the weak and what weight such representations and protests carry with the Government has been clearly demonstrated by the famous letter of Lord Reading to H. E. H. the Nizam in 1926. Roused from their slumber, as it were, by this rude shock to the most outstanding figure in the Princely world, the Princes demanded an examination of the relationship existing between them and the British Government. This brought into existence the But-

ler Committee which, while admitting the sacredness of the treaties, laid emphasis upon customs, usages and political practices of the Government of India. The issue was between two opposing theories : the Princes advanced the theory of '*Pacta sunt servanda*', which emphasised the binding character of all treaties and bilateral engagements in preference to all unilateral practices and usages ; the Committee, on the other hand, propounded the theory of "Paramountcy" which laid more stress on the political power of the suzerain, imperial policies, the force of practice, usage, sufferance and 'moral' obligations than on the 'legal' character of the treaties. Thus what was legally a breach of the treaties in the past received the stamp of recognition of experts, both legal and political. It is true that the Committee admitted the claim of the Princes that their relationship was with the British Crown and not with the Government of British India, a victory for the States. But it was a Pyrrhic victory and the naïve pronouncement of the Butler Committee that 'Paramountcy must remain paramount' reminds one of the famous message of the Oracle of Delphi, "Pyrrhus, the Romans shall conquer".

*What the Princes Wanted* :—

"Daughter am I in my mother's house
But mistress in my own" — Kipling.

This has been the insistent claim of the present generation of Indian Princes. It must be, it will be, the claim of the States *vis-a-vis* any government of India. These were the words which H. H. the Maharaja of Patiala, Chancellor of the Chamber of Princes, wrote on the eve of the Indian Round Table Conference. (*Asiatic Review*, 1930, Vol. XXVI, P. 3). Referring to the Imperial Conference of 1926 in which it was declared that the constituent States were autonomous communities within the British Empire, equal in status, in no way subordinate one to another in respect of their domestic or external affairs, though united by a common allegiance to the Crown, the Maharaja

of Patiala said : "If one wants to get an approximate notion of the attitude of the States, all one has to do is to think of this resolution in the light of the history of the British connection with the States which is enshrined in the subsisting treaties. Eliminate external affairs, slightly qualify equality of status with due regard to factors that cannot be ignored, substitute for the British Commonwealth of Nations, the Federated States of India, and you have in a nutshell, more or less, what is in the minds of the States". (*Asiatic Review* 1930, p. 3). The States did not put forth any extravagant claims or any strange proposals. Their objective was the due recognition of their treaty-rights and fair adjustment of conflicting interests between themselves and British India and Great Britain. To put it more clearly, the dominant inducement to join the Round Table Conference was the hope of getting the vague term 'Paramountcy' to fit within the framework of a legal definition with an independent tribunal to adjudicate upon the legality of the exercise of Paramountcy.

*What the Government of India Act offers*.—The Government of India Act of 1935, which is the product of the labour of several years of constitutional discussions, leaves Paramountcy completely untouched and thus shatters the only hope which prompted the Princes to join this scheme of Federation. Even in what it offers to the States in other matters, the Act is by no means generous towards them. It undoubtedly makes an ostensible show of maintaining the dignity of the States by giving them the right of entering the Federation by their Instruments of Accession. But the scope for negotiating these Instruments is so narrow that, for all practical purposes, the Act dictates terms to the Rulers which they may or may not accept. It creates a Legislature wherein the representatives of these sovereign States are in a perpetual minority and wherein the individual State is merely a drop in the ocean. It creates an Executive, in the formation and the policy of which

the States are not likely to have any effective voice and which, in the long run, must prejudice the internal administration of the States themselves. It creates a Judiciary which is impotent not only to protect the States from the pressure of Paramountcy outside the Federal sphere but even the interference of Paramountcy within it. Lastly by its conspicuous lack of any means of amending the Constitution the Act leaves the States again to the mercy of the British Government and to a State which once joins the stream, it leaves no option but to drift with the current.

*Paramountcy—'The Sword of Damocles'.*—The attempts of the States to get the term 'Paramountcy' which the Butler Committee could not or would not define, defined by the British Parliament, were completely frustrated. The reason is obvious. Once this 'Paramountcy' is defined, it will cease to grow. It will be confined within the narrow limits of a legalistic system and will have to depend for its interpretation upon the legal acumen of a judge and not upon the political predilections of an executive officer. It can no longer, as was desired by the Butler Committee 'fulfil its obligations defining or adapting itself according to the shifting necessities of the time'. Even with the creation of the Federation, Paramountcy continues to be as strong as ever. The Paramount power still retains the right to decide disputed successions, to interpose its authority in a State during the minority of a Prince, and above all, what is most detrimental to the safety—even the existence—of the Princes, the right to depose a Prince in the event of gross misgovernment or grave unrest. And who is to be the judge of this gross misrule or grave unrest? A bureaucracy has implicit faith in the 'man on the spot' theory and in arriving at their conclusions the Government of India will be guided, as in the past, by the reports of the British Resident whose imagination can create grave situations. It is no exaggeration to say that even with the establishment of the Federation,

Paramountcy will define or adapt itself according to the shifting necessities of the time brought about by the shifting judgment or even the moods and caprices of a British Resident in the State. Paramountcy still hangs like the sword of Damocles over the heads of the States.

*Paramountcy in Federal Sphere.*—There is no doubt that within its sphere Paramountcy is as strong as it was before the Federation. The next question which comes up is "does it in reality cease to exercise its powerful sway over the States even within the domain of the Federation"? Do the States get a completely free hand in policies and affairs of the Federal Government, compatible with their position in the Federal Constitution with a free right of approach to the Federal court against any Federal encroachment? Or, in other words, does Paramountcy obliterate itself from the Federal field altogether? It is true that by the acceptance of the Instrument of Accession of a Ruler, the Crown agrees to the maintenance of the subjects agreed to by the Ruler as federal, as distinct from those within the purview of Paramountcy. But to any one who has followed the general trend of all federations, it is clear that the Ruler will find it extremely difficult to maintain a vital distinction between Federal and non-federal subjects. The tendency of all federations is prominently centripetal and even in the United States where the constitution allots only a limited range of functions to the Federal Government, the central government has gradually extended its power and influence through the decisions of the Federal Court. In India, the amalgamation of the duties of the Governor-General and the Representative of the Crown will make it easier for the Federal government to extend its influence even in the matters which are strictly outside the Federal sphere. With the growing strength of popular solidarity in British India, there is a possibility of the Federal ministry, backed by a considerable majority in the Federal Legislature, operating even in the

sphere of Paramountcy with the consent and support of the Governor-General in the same way as the prerogative power of the Crown is used by English ministers. On the other hand, within the domain of the Federation, there will be numerous occasions in which the Federal ministry will be inclined to influence the States through the easier way of the Paramountcy powers of the Representative of the Crown. The provisions for the enforcement of the Federal laws or decrees of the Federal Court within the State are conspicuous by their absence in the Act. Although an explicit mention of the powers of the Federal Government to coerce a State or unit into obedience or to enforce the Federal law is not essential, and it is generally taken as implicit in the Constitution, the action against a recalcitrant State in other federal unions is taken by the Federal government itself openly and there is always a remedy open to the State to appeal to the Federal Court. In India, the Federal ministry has nothing to do directly with the States; it must act through the Governor-General who has the right to issue directions to the Rulers as to the way in which the instructions of the Federal government should be followed. The very existence of the Paramountcy powers in the hands of the Governor-General is enough to secure obedience to his directions and no State will have the courage to appeal to the Federal Court against the decisions of the Federal Ministry, supported by the Governor-General. Paramountcy, instead of being seriously affected by the new Act, may receive an accession of strength from the inevitable increase of Federal influence and power over the States.

*Can the States rely on Paramountcy?*—Looking at the matter the other way round, one is tempted to ask the question: "Can the States rely on Paramountcy for their own protection?" It is argued by some of the critics of the new scheme that the Rulers who supported the Federal proposals to escape from the trammels of Paramountcy will then regard it as their

sheet-anchor against the rising tide of democracy. They also argue that in proportion as British India extends her influence and organises the state subjects in political agitation, the Rulers will cling closer to Paramountcy. The Butler Committee, while defending the right of Paramountcy to interfere in the internal affairs of the States, declared that "On Paramountcy alone can the States rely for their preservation in the generations that are to come. Through Paramountcy is pushed aside the danger of destruction or annexation". It is essential to examine briefly this exhuberant claim of Paramountcy to protect the States. Historically most of the States entered into alliances with the British Government by means of treaties guaranteeing protection from outside aggression or internal dissensions. The question of protection from outside aggression does not practically exist at present since the States are surrounded by British Indian territory and no outside or foreign power can attack the States before conquering the intervening portion of British India. In this eventuality, there is obviously no possibility of the Paramount power offering protection to the States; on the contrary, it may have, perhaps, to seek protection with the States. But in the other case a State having to seek protection against internal risings, it may have to look to the Paramount Power. With the greater contact with British India that the Federal scheme will bring about, there will be currents of political thought flowing through the States which may endanger the loyalty of their subjects or the smooth working of their governments. These currents may not always be of healthy democratic ideas, from which the States have nothing to fear, but of subversive and revolutionary movements engineered by unscrupulous agitators from outside the States. The States can look to their own safety within their borders but for the eradication of the seed which might be sown outside their territories they will have to look to the Paramount Power for protection. With

gradual transfer of the powers of the Central Government into the hands of popular representatives in the Federation, it will not be an easy thing for the British Government to run to the help of the Rulers, with the risk of inviting a constitutional crisis and vehement agitation in British India. Even British writers like Sir William Barton, who had considerable experience in Indian States, point out the difficulty for the Paramount Power to help the States. In the *Quarterly Review* (July 1937) Sir William wrote " Will the States be crushed between the upper and nether millstones of the Federation and Paramountcy? Close observers of the Indian scene, including Indians themselves, give them twenty years of life at the most. This gloomy foreboding is not based on the supposition that the Crown will not act up to its obligations to protect the Princes; those responsible for it are inclined to the view that Princely India will sign its own death warrant. A strong central government, it is contended, is essential; this is possible only if the Princes form and maintain a united front; their dissensions, rivalries and jealousies make this impossible. Extremist politicians will know how to exploit their differences in order to obtain power, and, having obtained it, they will not rest till they have gained political control of the States. It would be difficult, if not impossible, for the Crown with an anti-British Government in power to interpose itself indefinitely between the States and the political agitator". It is evident that with the growth of the popular government the influence of the Paramount Power will diminish not only in British India but also ultimately in the States. The States will have to stand on their own legs to face boldly and squarely the situation as it may arise in the future.

*Should the States join the Federation?*—The study of the position of the States in the Federation reveals that the States have no material gain from the new constitution. It does not improve their present position, nor does it show any signs

of a better time in the future. One naturally asks the question : 'why should the States join the Federation at all ?' The answer lies not in its utility or desirability but in its inevitability. The history of the last hundred years shows how the two main divisions of India have been knit together indissolubly by modern means of transport and communication. The economic life of the States and British India is so completely inter-dependent that isolation for the States is pratically impossible. These factors of the modern world have brought them into so close a contact that some sort of political union is inevitable. Looking from the other side, keeping out of the Federation also can do them no good. By joining the Federation, they get some voice, however feeble it may be, in shaping the policy of the Federal Government. By keeping outside the Federation, they will still for the most part be subject to the policy of the Federal Government without any possibility of influencing that policy in their interest. The only wise course is to take as much out of it as possible and then fight for more. The States must remember the moral of 'union is strength' and join the Federation in a compact body. Then and then alone will they succeed in leaving their impress upon the course of Federal legislation and show to the world that the States are still capable of offering some constructive help to the nation.

*Are the States an 'Anachronism' ?*.—There are people who assert that the Indian States have outlived their existence and cannot fit in the body politic of a modern State. There are others who regard them as relics of a deplorable past, incapable of assimilating modern ideas of good government. There are still others who regard them as picturesque survivals of mediæval feudalism which, sooner or later, are destined to be swept away in the advance of western ideas. The answer to this can best be found in the following extracts from the speeches or writings of prominent persons in different walks of life. Speaking at the First Round Table Conference H. H. the

Maharaja of Patiala, late Chancellor of the Chamber of Princes, said "The Indian States have survived many cataclysms; they may survive many more. In my view it is just their strength and vitality, their sturdy vigour, which carried them through so many trials, which gives them their greatest value as elements in the future polity of India and as links in the chain of common loyalty, common affection and common interests." (*Proceedings*, p. 80). The late Prof G. R. Abhyanker, who was once the President of the All-India States' Peoples Conference, wrote: "There is a warmth of feeling between the subjects and their Rulers in native States. The historic associations, the inspiring memories, the tie of feudal relations, the traditional loyalty and reverence tend to preserve cordial relations between the Ruling Princes and their devoted subjects. The icy coldness and the aloofness of the bureaucratic rulers and the masses which is a disquieting feature of the alien British rule, does not exist in native States." (*Problems of Indian States*, p. 225). A prominent British Indian politician and one of the leading constitutional lawyers in India, Sir Shivswami Iyer, says: "None of us would venture to say that the day of the Indian States is past. They have still a great purpose to serve and a high destiny to fulfil in the polity of India. They have served in the past as nurseries of Indian statesmen when Indian talent could find no scope for high employment in British India." (*Indian Constitutional Problems*, p. 203). Lastly let us read how an English statesman looks at the Indian States. At a meeting at Chatham House on 28th October 1934, Sir Henry Lawrence said, "The preservation of Indian States was for these reasons necessary to the welfare and progress of India. They had provided opportunities for ambitious and capable Indians to exercise their talents and to demonstrate to their countrymen and to the world that Indians were capable of administrative power and could produce statesmen of a high degree of intellectual

achievement. The annals of Indian military history gave many instances of leaders whose exploits proved them to be men of courage and ability; the present rulers, often descendants of those warriors, possessed in large measure the loyalty and affection of many millions of the martial races of India. The Rajputs, the Sikhs and the Marathas, not to mention the Moslems, had not forgotten their warlike traditions. Their States formed an almost continuous line from the North to the centre of India but did not cover those areas on the east where political agitation was most rife. If there should be explosions of violence, the Indian Princes with the Indian statesmen around them, provided the new constitution offered them terms suitable to their history and dignity, would be the most powerful factor in maintaining law and order and in securing the preservation of India as a willing partner in the British Commonwealth" (*International Affairs*—January—February 1935). These extracts from the speeches or writings of persons of different shades of opinion are enough to prove that the Indian States have still as high a place in Indian political life as they had in historical times. To say that they are an anachronism is doing them a grave injustice. And if they are so, what is the remedy? Democracy! One who has watched the vicissitudes through which democracy has passed in post-war years and which finds its staggering expression in Germany, Italy or Russia, would shudder at the idea of such a democracy. In fact the world has already begun to consider if democracy itself is not an anachronism. The East is often accused of borrowing second-hand ideas from the West and nothing would be a greater and more ludicrous imitation of the West than the wholesale importation of Western ideas of democratic rule with their inseparable concomitants of class war and class rivalries. What is essential is a judicious balancing of democratic principles and historical traditions with regard to the development of political life in the Indian States. The

States need not be condemned simply because they are monarchies. A benevolent monarchy is still capable of offering to the world what democracy has failed to do.

*Monarchy as a Form of Government.*—Theoretically monarchy has, perhaps, more to commend itself than democracy. It is a form of government which, more than any other, possesses the elements of strength, simplicity of organisation, ability to act quickly, unity of counsel, continuity and consistency of policy and certain prestige in the conduct of foreign affairs. Even Rousseau, himself a radical democrat, admitted that absolute monarchy was not without merits. "Where such a system prevails", he said, "the will of the people and the will of the prince, the public force of the state and the individual force of the government all respond to the same motive power; all the springs of the machine are in the same hand and all look to the same end. There are no opposing movements which destroy each other and no sort of constitution can be imagined in which a slight effort produces greater action". (*Contract Social, Book III.* Chapter 6). The German political philosopher, Treitschke, defended monarchy as distinctly superior to democracy. "It is an ancient experience", he said, "that monarchy presents more perfectly than any other form of government a tangible expression of political power and national unity; hence its marvellous appeal to the average understanding and to natural reason, of which we Germans saw a striking example in the early years of our new Empire". (*Politics, Vol. II*, p. 58). The English philosopher, David Hume, says, "Though all kinds of governments be improved on in modern times, yet monarchical government seems to have made the greatest advance to perfection. It may now be affirmed of civilized monarchies, what was formerly said of republics alone, that they are a government of laws, not of men. They are found susceptible of order, method and constancy to a surprising degree. Property is there secure; industry is

encouraged ; the arts flourish ; and the prince lives among his subjects like a father among his children ". The ideas of David Hume are so familiar to Hindu ideology of kingship. The King has always been considered in India as the father of his subjects who have an innate love and affection for him. Although, through the influx of modern ideas, kingship has suffered diminution in its reverence, there is still an inborn love and admiration in the subjects of the States for their Rulers. Even in the India of to-day, there are some States which can show the path of progress to the government in British India. The introduction of compulsory education, enactment of social legislation of far-reaching importance, the impetus to rural developments etc., in the Baroda State are things which British India has yet to achieve. Similar things can be mentioned of many other States. One cannot deny that history provides examples of monarchs who abused their power and influence ; but the same history provides instances of democracies having become tools of oppression in the hands of ambitious dictators. The world has not yet been able to discover a form of government which is absolutely fool proof. Every known form of government has its defects. Any government, whether it is a monarchy or a democracy, can conduce to the welfare of the people in proportion to the spirit of cooperation between the governors and the governed.

*Position of Indian Princes not Enviable.*—' Uneasy lies the head that wears the crown '. If ever these words had any meaning, they are most pitifully applicable to the Rulers of Indian States. Those who profess to believe that under the aegis of British rule the Prince, being safe from external aggression, or internal insurrection, is the happiest person in the world, are either ignorant of facts or pretend to be so. The dominating influence of Paramountcy with its vague and exaggerated claims does cause apprehension in the minds of Indian Princes who have been alarmed at the excessive swing of the

political pendulum on the opposite side. All their energies are directed towards avoiding the shoals and rocks while sailing the ship of the State to see that it does not founder on the rocks of Paramountcy whose political agents on the spot are left to imagine a probable 'rising' on the part of the 'disaffected people', 'oppression of any race or class' or 'grievous injustice to individuals'. A few of the instances since 1857 will suffice to illustrate the fear which constantly haunts the minds of Indian Princes like nightmares. The deposition of the Nabob of Tonk in 1867, the suppression of the Maharaja of Alwar in 1870, the deposition of the Gaikwad of Baroda in 1875, the enforced resignation of the Maharaja of Kashmir in 1889, the execution of the Senapathi of Manipur in 1891 on charges of treason, the deposition of the Maharaja Rana of Zalawar in 1897, the interference in the administration of Udaipur in 1921, the 'voluntary abdication' of the Maharaja of Nabha in 1923 and his subsequent internment at Kodaikanal, the 'voluntary abdication' of the Maharaja of Indore who refused to submit to a commission of inquiry as being against his treaty rights in 1926, and lastly the enforced absence from his State of the Maharaja of Alwar in 1934 till his death, are a few of the instances which demonstrate the natural anxiety and perplexity of the Princes. Their position has been correctly depicted by Sir Henry Cotton, a distinguished Anglo-Indian official, thus : " They are powerless to protect themselves. There is no judicial authority to which they can appeal. There is no public opinion to watch their interests. There is no publicity to contest the action of a government which is able to decide their fate as it pleases. Their rank and honour depend on the pleasure of a British Resident at their Court and on the secret and irresponsible mandates of a foreign office at Simla". (*New India*, by *Sir Henry Cotton*). In addition to the prominent cases stated above, there are usually a number of petty insults and pin-pricks which the Rulers have to bear at the

hands of the subordinate officers of the Crown and which greatly exasperate their patience. To add to their worries, there is often the danger of communal and political troubles which endanger the peace and safety of the State itself. The recent instances of such troubles are the communal disturbances in Kashmir and the recent congress flag satyagraha in Mysore. A sincere study of the unfortunate position of the Prince in India cannot fail to evoke sympathy for him. In short, the thrones of Indian Princes are by no means beds of roses. Their position is certainly not enviable. It is the wearer alone who knows where the shoe pinches!

*British Indian People and the States.*—The three principal parties which are mainly interested in the political development of India and the successful working of the new scheme of an All-India Federation are people in British India, the subjects of the Indian Princes and the Indian Princes themselves. It will not be out of place to consider what the duties of each of them are and how they can play their proper part in the future of their country. So far as the people in British India are concerned, they owe a great deal to the Indian States. In the first place, while everything was being swept away before the onslaught of the British forces, it was the Indian States that kept their flag flying and if to-day they are feeble and are not in a position to assert themselves, they are still the living memorials of the ancient glory of India. They are the conservators of a great tradition, of an ancient civilization and of a proud culture. At a time when the dynamic machine-made civilization of the West threatened to overwhelm the ancient Indian culture, it was the States which proved themselves the real conservators of the traditional arts and crafts and even to-day it is the Indian Princes who are the real patrons of art and learning in India. It was within the Indian States that Indian talent, whether in the sphere of arts or politics, found the freest and for a time the

only scope ; it was within the Indian States that men like Sir Salar Jung, Sir T. Madhavrao and Sheshadri Iyer discovered opportunities of self-realisation, of work for the motherland, that were not available to them in British India. And to-day is it not the case that Indian Princes can count among their ministers and advisers, statesmen of whom the whole of India may well be proud ? British Indian people can rest assured that the Indian Princes will never be a hindrance to them in the achievement of their political aims. The Princes have always maintained a strict impartiality and neutrality towards all political movements in British India. In other respects they have actively helped them and there cannot be any institution of repute in British India which has not, at one time or another, drunk at the fountain of their benevolence. The Indian States have it in their power to make a contribution no less to the great India of the future than the contribution of British India herself. Nor is this contribution confined to a historic continuity of culture, a proud sense of citizenship, a solidity of political institutions transcending differences of caste and creed. The Indian States can contribute something else, which until the millenium arrives, is no less important to the life of a country than the arts of peace, namely, the capacity for self-defence. It is in the Indian States that there still flourish most prominently such organised military life and tradition as would enable them to make the most valuable contribution to the India of the future.

*Duty of British Indians Towards States.*—The people in British India owe a corresponding duty to the States and that is the maintenance on their part of strict neutrality towards all activities within them. While they can sympathise with the movements for democratic developments in the States, they ought not to interfere within the legitimate province of the States nor should they encourage any activities that would create feelings of disloyalty or disaffection towards their

Rulers. Their active participation in the politics of the States is as unjustified as the solicitude expressed by the Germans for the German-speaking people in Austria, resulting in the annexation of that country and their subsequent anxiety for the welfare of the Sudetans in Czechoslovakia. The wisest course is to leave the question of constitutional reform in the Indian States to the population of the States themselves and to the natural effect of the association of the State representatives in the Federal Legislature with the democratic element from British India. When there is a real demand—and such demand is already becoming visible—the Rulers will not fail to meet it half way. Their whole strength lies in good understanding with their people and this they know full well.

*The Subjects of Indian States.*—A great responsibility lies upon the subjects of the Indian States. While no one would discourage them from the path of political self-realisation, it is necessary for them to remember that real progress can be achieved only by self-help. No people can ever hope to get freedom with the aid of mercenaries. The States subjects, while they are fully entitled to claim a greater and higher share in the government of the States, cannot afford to lose sight of the fact that the safety both of themselves and their Rulers lies in appearing before the world as an undivided entity. Brought up in the age-long traditions of monarchical governments, they must remember that it is not easy to handle democratic weapons without some insight into the art of democratic methods and government. Instead of being carried away by slogans and shibboleths of democracy, which few of them really understand, they must pause and try to realise the position not only of themselves but of their Rulers. With their peculiar position and relationship with the Paramount Power it is difficult, if not impossible, for the Rulers to grant responsible government to their subjects and at the same time remain themselves responsible for the fulfilment of the

obligations which they are expected by the Paramount Power to fulfil. The Rulers are not even free to introduce material changes in their governments without the consent of the British Government. Article 19 of the Mysore Treaty of 1913, for example, stipulates that 'no material change in the system of administration now in force shall be made without the consent of the Governor-General in Council'. Although with the growth of popular pressure this consent of the British Government may not, in course of time, be difficult to obtain, the Rulers have to reckon with this factor before they take any further steps. The essence of all these arguments is that the subjects of the States must try to achieve their progress by steady evolutionary processes and not by haphazard measures which are likely to endanger the safety of themselves and their Rulers and the ultimate welfare of the whole State.

*What the Subjects can Expect at Present.—*

> For forms of government let fools contest.
> That which is best administered is best.
>
> —POPE

Although one may not agree with this famous aphorism of Pope, too much importance need not be attached to forms. They are merely a means to an end. The importance to be attached to them must be estimated according to the extent to which they conduce to the end in view which should be the happiness, the contentment and the prosperity of the people, the machinery of government should be simple, inexpensive and easily intelligible and there should be intimate personal contact between the people and those in authority. To achieve this end the essential thing is not that monarchical form of government should vanish from the States, but that the absolute personal discretion of the Rulers should be tempered with safe and modifying counsel. So long as the subjects of the States enjoy the recognised rights of citizenship and these

rights cannot be overridden by individual caprice; so long as justice is administered without executive interference, and the public services are secure and efficient; so long as person, property and honour are safe, industry and agriculture are fostered and education on a large scale is provided there will be little to cavil at in the government of the States. For the creation of these conditions no particular form of government is indispensable. An autocratic Germany provided all these blessings in a greater degree than any democratic government. But if these essential conditions of the moral and material advancement of a people are not dependent on the forms of government, they must be admitted to be dependent upon the mutual realisation that the state exists as much for the people as for the Rulers. More specifically to the people of the States this realisation would mean that the administration of the States would be animated not by a spirit of private ownership, but by a desire for their progress and well-being. This is the same thing as saying that constitutional government must be gradually evolved in the States. This is practical politics; all else is impatient idealism.

*The Princes and Political Development of the States.*— Last of all, and the most important, is the consideration of this problem from the point of view of the Princes. On them lies a very great responsibility not only for the welfare of their subjects but for their own future in the trend of political developments in India. The lessons of history indicate tendencies which are distinctly antagonistic to the principles of absolute or autocratic rule. In the wake of the new spirit powerful kingdoms have been swept away. The Ottoman and the Hapsburgs have gone; and so also the Romanoffs and the Hohenzollerns. But history points out that in spite of the rudest of shocks given by the last World War, constitutional monarchies have still survived, some of them, perhaps, becoming even stronger than before. It is interesting to notice that

in spite of the new spirit and the new ideas of democracy, nearly half the nations of Europe have still the monarchical form of Government. But the common feature of all these monarchies, is that they are all of them, more or less, constitutional. Looking nearer home, we notice that with the gradual development of responsible government in British India, the States have already been considerably affected and with their further contact with democratic provinces, this process will be accelerated. The association of their representatives with elected representatives from British India is bound to have some effect upon the general political tone of the people. In his memorandum submitted to the Joint Parliamentary Committee Sir Tej Bahadur Sapru said: "I am strongly of the opinion, however, that one result among others of the association of British India and Indian States in the field of common activity in the Federal Legislature, will be to facilitate the passage of the Indian States from their present form of autocratic government (I use the expression in no offensive sense) to a constitutional form with the rights of their subjects defined, ascertained and safeguarded". (*Records*, vol. III, p. 248). Besides these natural results, there are constitutional writers like Sir A. B. Keith, who advocate even interference by the Paramount Power. "With the advance of political rights in British India" says Sir A. B. Keith "it is inevitable that the autocracy of the States should become more and more anomalous. The Paramount Power having decided that it is proper that the people of British India should be encouraged to exercise political power, cannot logically maintain the view that the Indian States should deny their subjects the right to advance in political status. It seems clear, therefore, that the Crown should endeavour by the use of its authority to secure the gradual extension of political rights to the people". (*Constitutional History of India*, p. 444). The recent writings and speeches of Lord Lothian on

the Indian question also advocates the necessity of some influence of the Paramount Power over the States in the case of nominating their representatives. These views are mentioned as indications or anticipations of coming events and the Princes have nothing to be afraid of in them if only they adjust their machinery to make it suitable for changed conditions.

*What the Princes are expected to do immediately.*—No one can urge the States to rush headlong into any servile imitation of constitutional changes in British India. They cannot afford to ignore centuries of past traditions and heredity which did secure the well-being of their people in those times. Nor can they choose to follow blindly western types of representative and responsible government whose universal applicability is already being questioned. What is expected of the Princes is the preference of the Rule of Law to the rule of personal caprice. What is absolutely necessary is that the world at large should feel that the governments of the States are beneficent; that the States afford to their subjects not only the blessings of peace and protection but also an incorruptible machinery for the dispensation of justice based upon a clear recognition of the rights of citizenship. They must afford to their subjects the opportunities of growth and of securing physical, moral and intellectual well-being. In short, the States must provide an independent judiciary, a well-trained and adequate police force, and an arrangement by which, after all the legitimate wants and needs of the Ruling family have been reasonably provided for, the rest of the revenues of the States are devoted to the amelioration of their subjects. By having a well-defined programme of all-round advancement of their subjects, the States must show that they are doing all in their power to fit their subjects in the task of moulding their destinies.

*The Princes and the Growth of Popular Institutions in the*

*State.*—"The worth of a State, in the long run, is the worth of the individuals composing it ;....a State which dwarfs its men, in order that there may be more docile instruments in its hands even for beneficial purposes, will find that with small men no great things can really be accomplished ; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing for want of the vital power which, in order that the machine may run more smoothly, it has preferred to banish". (J. S. Mill '*On Liberty*', p. 207). The measures mentioned in the last paragraph will no doubt secure administrative efficiency. But administrative efficiency is only one of the tests of a good government. The prime end of all governmental systems should be the cultivation in the people of a vigorous political vitality, a patriotic loyalty and social solidarity. No government which does not rest upon the affections of the people, which does not stimulate among them an interest in public affairs and create an active, intelligent and alert citizenship, can be called ideal ; and, certainly, no government from which the participation of the people in some form is excluded will ever be able to produce such a body of citizens. The Princes must, therefore, look around and ponder over the situation as it is gradually developing in India. By joining the Federation, they need not be afraid of exposing themselves to the full force of the democratic surge in the rest of India. In this connection it is significant to note what a responsible minister of one of the leading States in India said at the Round Table Conference : "One is reminded of King Canute's elaborate rebuke to his courtiers. I do not believe that democratic sentiment would in any event stop short at the boundaries of the States. The wisest course is to recognise and understand the new forces and adjust ourselves to them. Like all great forces they can be wisely directed and controlled if properly understood. They cannot be successfully dealt with by imitating the ostrich". (*Sir Mirza Ismail*

*at the First R.T.C. Proceedings*, p. 481). By gradually giving their subjects a share in the government of the States, they can expect them to share their anxieties also. They must certainly remember that their ultimate security depends not upon benevolent protection from the Paramount Power but on loyalty in the hearts of the people whom they rule. The history of German Princes, who had to suffer abdication or dethronement on the overthrow of the central power of the Empire, is an object lesson for the Princes. It is only by an intelligent realisation of the truths of history and by an active co-operation of their subjects that the Princes can considerably prolong, if not perpetuate, their existence in the very teeth of antagonistic forces. One can only complete this subject with a fervent appeal to the Princes of India to remember the wise words of H. H. Sir Sayajirao, the late Maharaja of Baroda, words to which he lived up in his glorious rule of over sixty years, and in which he reminded the British Government at the Round Table Conference of their duty towards the Princes and people of India : " In their prosperity will be our strength ; in their contentment our security ; in their gratitude our best reward ".

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